(10)

No. 90-1802-CFX
Status: GRANTED

Title: Nationwide Mutual Insurance Company, et al., Petitioners
v.
Robert T. Darden

Docketed:
May 21, 1991

Court: United States Court of Appeals for the Fourth Circuit

Vide:

Counsel for petitioner: McCutchan,Gordon E. M.

Counsel for respondent: Follin,Marion G.

Entry	Date	Note	Proceedings and Orders
1	May 21 1991	G	Petition for writ of certiorari filed.
2	Jun 21 1991		Brief of respondent Robert T. Darden in opposition filed.
3	Jul 22 1991		Reply brief of petitioner filed.
4	Jul 24 1991		DISTRIBUTED. September 30, 1991
6	Oct 7 1991		REDISTRIBUTED. October 11, 1991
7	Oct 15 1991		Petition GRANTED.
			**********
8	Nov 20 1991		SET FOR ARGUMENT TUESDAY, JANUARY 21, 1992. (2ND CASE)
9	Nov 27 1991		Joint appendix filed. VIDED.
11	Nov 27 1991		Brief of petitioners Nationwide Mutual Insurance Co., et al. filed.
12	Nov 27 1991	G	Motion of National Association of Independent Insurers for leave to file a brief as amicus curiae filed.
10	Nov 29 1991		Brief amicus curiae of United States filed.
17	Dec 3 1991		Record filed.
		*	Certified proceedings and briefs, U.S.C.A., 4th Circuit and U.S.D.C., Eastern District North Carolina (1 BOX)
13	Dec 5 1991		CIRCULATED.
14	Dec 9 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Dec 16 1991		Motion of National Association of Independent Insurers for leave to file a brief as amicus curiae GRANTED.
16	Dec 16 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
18	Dec 23 1991	X	Brief of respondent Robert T. Darden filed.
19	Jan 14 1992	X	Reply brief of petitioners Nationwide Mutual Insurance Co., et al. filed.
20	Jan 21 1992		Argued

Supreme Court, U.S.
FILED
MAY 21 1991
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No. 90-1802

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether insurance agents acting in a traditional independent contractor capacity are "employees" for purposes of the Employee Retirement Income Security Act of 1974, as amended?

LIST OF PARTIES PURSUANT TO RULE 29.1

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners.

Petitioners are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Petitioners, parent companies of the Petitioners, and mutual insurance companies and mutual funds affiliated with the Petitioners.

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Co.
Wausau Country Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ——

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company (collectively, "Nationwide")[1] hereby petition that a Writ of Certiorari issue to

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners is included at page (ii) of this petition.

review the judgment of the United States Court of Appeals for the Fourth Circuit, which is in direct conflict with three other courts of appeals on an important question of federal law.

This case presents the question whether insurance agents, and other persons, acting in a traditional independent contractor capacity are "employees" for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Nationwide provides an incentive compensation arrangement to certain of its insurance agents, including plaintiff Robert T. Darden ("Darden"). That contractual arrangement includes a term imposing a financial penalty (loss of future payments) in the event a former agent engages in limited competitive activities. Darden sued under ERISA section 1132(a)(1)(B), alleging that the nonforfeiture requirements of ERISA (29 U.S.C. § 1053(a)) prevented enforcement of that provision against him. Nationwide believes that ERISA does not apply to this arrangement because Darden was not an "employee" of Nationwide within the meaning of ERISA, which is a predicate to application of the statute. The United States Court of Appeals for the Fourth Circuit announced an unprecedented and expansive standard of "employee" status under ERISA that looks to the existence of a retirement plan, the worker's reliance on that plan, and the worker's bargaining power with respect to that plan. That test conflicts with the common-law agency principles properly applied to determine "employee" status under ERISA by the Fifth, Sixth and D.C. Circuits. Nationwide believes, and the Solicitor General of the United States has concurred, that this issue warrants this Court's review. Accordingly, this Court should grant the Petition for Writ of Certiorari.

OPINIONS BELOW

The initial unreported decision of the United States District Court for the Eastern District of North Carolina in this matter was issued on May 23, 1985, and is reprinted in the Appendix (hereinafter cited as "App.") at 47a. The decision of the Fourth Circuit vacating and remanding that initial decision is reprinted in the Appendix at 32a and reported at 796 F.2d 701 (1986) ("*Darden I*"). The order of the Fourth Circuit denying rehearing with respect to *Darden I* is reprinted in the Appendix at 53a. The decision of the District Court on remand is reprinted in the Appendix at 13a and reported at 717 F. Supp. 388 (1989). The second opinion of the Fourth Circuit, dated January 7, 1991, is reprinted in the Appendix at 1a and reported at 922 F.2d 203 ("*Darden II*"). The order of the Fourth Circuit denying rehearing with respect to *Darden II* is reprinted in the Appendix at 51a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254-(1) (1988). The decision of the Fourth Circuit in *Darden II* was issued on January 7, 1991. Petitioners timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc on January 18, 1991, which was denied on February 22, 1991.

STATUTE INVOLVED

Section 3(6) of Title I of ERISA, 29 U.S.C. § 1002(6) (1988), provides: "The term 'employee' means any individual employed by an employer."

STATEMENT OF THE CASE

Nationwide is one of the largest insurance groups in the United States. It underwrites risks through a sales force of independent contractor agents. The relationship

between Nationwide and the agent is governed by an Agent's Agreement. The Agreement specifies that the agent is to act in the capacity of an independent contractor. App. 39a, 49a.

Since 1969, the Agent's Agreement has provided a form of agent compensation presently referred to as the Agent Security Compensation Plan ("ASCP"). The ASCP was designed to provide an incentive to agents to increase Nationwide policy sales, and is conditionally payable after termination of the agency with Nationwide. The Agent's Agreement expressly provides that ASCP payments will not be made if a former agent engages in the insurance business, in competition with Nationwide, within one year of the cancellation of his contract with Nationwide and within a twenty-five mile radius of his Nationwide business location, or in certain other circumstances. App. 3a.

In 1960, Darden became an independent contractor agent for Nationwide and continued in that capacity until 1980. Nationwide's relationship with Darden was governed by eight successive Agent's Agreements, and Darden operated his insurance agency as an independent business. He selected the customers and types of Nationwide insurance he focused on selling. He selected and owned the building and equipment he used in his business. Darden hired and compensated his own staff. He received compensation from Nationwide solely in the form of commissions, which he reported to the Internal Revenue Service as income from self-employment. App. at 39a-40a, 48a-49a. In short, Darden was wholly responsible for the operation of his insurance agency and for his economic success or failure.

In 1980, Nationwide properly exercised its right to terminate Darden's agency contract. One month later Darden reopened his insurance business at the same location he had previously used as a Nationwide agent. He

immediately began representing Nationwide's competitors. Nationwide notified Darden that, by the terms of the Agent's Agreement, no ASCP compensation would be paid to him. App. 3a-4a. Darden brought an action in federal district court alleging that ERISA precluded the enforcement of the conditions for ASCP payments against him and seeking those payments and other relief.

There is no dispute that Darden violated the relevant terms of the Agent's Agreement. The parties disagree whether ERISA is applicable to that Agreement. Darden contends that the minimum vesting requirement of section 203 of Title I of ERISA, 29 U.S.C. § 1053 (1988), applies and does not permit enforcement of the ASCP conditions. That vesting requirement is applicable by its terms only to "employee pension benefit plans," which in turn are limited by statutory definition to specified arrangements for "employees." *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1988). Nationwide contends that Darden was not its "employee."

In its initial decision, the District Court held on summary judgment that ERISA was inapplicable because Darden was not Nationwide's "employee," applying common-law agency principles. *See Darden v. Nationwide Mutual Insurance Co.*, No. 83-96-CIV-3 (E.D.N.C. May 23, 1985). In *Darden I*, a panel of the Fourth Circuit agreed that Darden most probably was Nationwide's independent contractor at common law. However, the court concluded that "the common-law test for the relationship of master and servant is not the appropriate standard for application" under ERISA. App. 40a. Citing *United States v. Silk*, 331 U.S. 704 (1947) (defining "employee" for purposes of the Social Security Act) and *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (defining "employee" for purposes of the National Labor Relations Act), the panel argued that it should disregard common law and develop an "employee" definition from the stated

purposes of ERISA. The panel then announced a novel, three-part test for ERISA "employee" status, which may be stated as follows:

(1) Whether the "employer" took some action that created a reasonable expectation on the "employee's" part that retirement benefits would be paid in the future;

(2) Whether the "employee" relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service and by foregoing other significant means of providing for retirement; and

(3) Whether the "employee" lacked sufficient bargaining power to obtain contractual rights to nonforfeitable retirement benefits. App. 41a-42a.

The Fourth Circuit remanded the case to the District Court. The principal issue on remand was whether Darden satisfied the second, or "reliance," element of the *Darden I* test. The evidence showed that in 1980, Darden had accumulated (primarily through his insurance business) approximately $450,000 in personal assets and retirement programs, disregarding the ASCP. These assets, together with his ongoing insurance business, were sufficient to secure his financial future. App. 18a-20a. Because only a fraction of these assets were in formal retirement arrangements, however, the District Court held that Darden met the reliance element of the *Darden I* standard and was Nationwide's "employee" for ERISA purposes. App. 23a. For other reasons, the court held that a portion of the ASCP payments were not subject to ERISA. Accordingly, the District Court entered judgment in part for Nationwide and in part for Darden.

Cross appeals were taken. In *Darden II* the Fourth Circuit affirmed the District Court's decision, specifically relying on the *Darden I* standard to determine "employee" status. App. 5a-8a.

REASONS FOR GRANTING THE WRIT

The standard for "employee" status is fundamental to the scope of ERISA. The Fourth Circuit has conceived a standard that sharply conflicts with the standard applied in the other circuits. As with other federal statutes that have raised similar issues and engendered conflicting interpretations, this important federal question merits resolution by this Court. The Solicitor General of the United States has concurred that the ERISA "employee" issue warrants this Court's review, as discussed more fully at pages 9-10, *infra*.[2]

The Fourth Circuit predicated its *Darden* standard not on the language, legislative history or administrative interpretation of section 3(6) of ERISA, but on this Court's decisions in *Silk* and *Hearst*, *supra*. This Court in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947), held that "employee" should be defined for Social Security Act purposes by common-law principles realistically applied. *See Silk*, 331 U.S. at 713-716; *Bartels*, 332 U.S. at 130.[3] The *Darden I* opinion

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[2] Earlier this Term this Court denied a petition for certiorari raising the issue of the standard for determining "employee" status under ERISA. *Plazzo v. Nationwide Ins. Co.*, No. 89-1499 (Oct. 29, 1990). In *Plazzo v. Nationwide Mutual Ins. Co.*, No. 88-4016 (6th Cir. Dec. 22, 1989), the Sixth Circuit held that a former Nationwide agent was not an ERISA "employee," applying common-law agency principles. App. 54a-58a. As discussed at pages 9-10 *infra*, the Solicitor General filed an *amicus* brief with this Court in *Plazzo* supporting the granting of the petition and adoption of common-law agency principles under ERISA. Because *Darden II* was then pending, it was uncertain whether the Fourth Circuit would apply its *Darden I* standard in a manner conflicting in result with the standard adopted in the other circuits. *Darden II* confirms a conflict among the circuits ripe for this Court's review.

[3] *See also Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 3 (1962), noting that the Social Security provisions, as amended subsequent to *Silk* and *Bartels*, "specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship."

rejects common-law principles under ERISA. In *Hearst*, this Court did define "employee" under the NLRA primarily by reference to "the history, terms and purposes of the legislation" (322 U.S. at 124). However, Congress subsequently repudiated that approach and reinstated common-law agency principles under that statute as well. *See, e.g., NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968).

The three courts of appeals that have considered the ERISA "employee" issue since *Darden I* have applied common-law agency principles. *See Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101-1102 (5th Cir. 1990); *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245, 250-251 (6th Cir. 1989) (involving the same Nationwide Agency Agreement); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (D.C. Cir. 1987). The Fifth and Sixth Circuits expressly rejected the *Darden* test.

These three circuits concluded "[t]he absence of a comprehensive definition of 'employee' in ERISA and other features of that legislation" indicate that Congress intended common-law principles to apply. *Holt*, 811 F.2d at 1538 n.44. They correctly reasoned that, under the statutory provisions for coordinating the tax and labor law titles of ERISA, tax regulations govern the ERISA nonforfeiture requirement at issue in this case.[4] Those regulations adopt the common-law test of "employee" status.[5] The *Darden* decisions neglect those regulations

[4] Section 3002(c) of ERISA, 29 U.S.C. § 1202(c) (1988), provides in relevant part that regulations prescribed by the Secretary of the Treasury under the Internal Revenue Code vesting requirements shall also apply to the counterpart vesting requirements of Title I of ERISA, and forbids the Secretary of Labor from adopting inconsistent regulations.

[5] The tax nonforfeiture rules follow the FICA "employee" definition, which provides that "[e]very individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee." 26 C.F.R. § 31.3121(d)-1(c)(1). Congress

altogether. As further evidence of Congressional intent, the *Holt* court also observed that the federal labor laws generally define "employee" status by reference to common-law agency principles.[6]

Further, in *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548, 1553-1555 (D.C. Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 347 (1990), the D.C. Circuit confirmed its use of common-law agency principles under ERISA in light of this Court's decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (adopting common-law principles to define "employee" for purposes of "work made for hire" provisions of Copyright Act of 1976). In that case, this Court concluded that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 739-740.[7]

The *Darden* standard is also contrary to the United States government's interpretation of ERISA. In an

has added that the term embraces certain others, including "a full-time life insurance salesman" (Internal Revenue Code § 3121(d)-(3)(B)). Thus, Congress recognized that insurance agents are usually not employees under the common-law rules. Moreover, Congress made clear that it did not intend its extension of the definition of "employee" in FICA to cover persons like Darden even if they sold only life insurance, since it further provided that life insurance salesmen are not employees for purposes of FICA if (like Darden) they have "a substantial investment in facilities used in connection with the performance" of their services. Internal Revenue Code § 3121(d)(3).

[6] *See, e.g., NLRB v. United Ins. Co., supra*, 390 U.S. at 256 (NLRA); *Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (noting that the National Labor Relations Board has adopted the common-law test).

[7] For cases applying common-law principles under the Federal Employers Liability Act, see, *e.g., Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974), and the cases cited therein.

amicus curiae brief filed at the invitation of this Court with respect to the petition for writ of certiorari in *Plazzo*, the United States concurred that common-law agency principles, applied with an awareness of the purposes of ERISA, are the proper standard for determining ERISA "employee" status. The United States emphasized the interpretation of "employee" adopted by the agencies that administer ERISA and the need for coordination of the applicable tax and ERISA definitions on this issue. The United States also expressed concern that the *Darden* test was weighted toward a finding that *any* participant in a benefit arrangement was an "employee." Applying ERISA to "any retailer who works continuously and exclusively with another company—including, for example, the owners of many automobile dealerships" stretches the definition of "employee" beyond its limits, in the view of the United States. *Amicus* Brief at 13. Nonetheless, the results in any particular case are prospectively unpredictable under *Darden* because they depend on *each individual's actual reliance* on the expected payments. The United States further found that agency principles better serve the legislative policies underlying the vesting provisions of ERISA, which are limited to employees and do not extend to independent contractors running their own business.

More generally, the concerns reported to and evinced by Congress during its extensive hearings[8] and reports[9] preceding the enactment of ERISA in 1974 related to traditional private pensions for employees at common law or covered by collective bargaining agreements. *See generally Schwartz v. Gordon*, 761 F.2d 864, 868 (2d Cir. 1985). Nothing in the text of this "comprehensive and reticulated statute"[10] indicates that Congress intended any other meaning. Of course, Congress might have extended the coverage of ERISA to all persons eligible to participate in plans providing benefits of the sort listed in section 3(2) of ERISA, 29 U.S.C. § 1002(2). Congress instead chose to limit coverage to plans providing retirement benefits to "employees." In contrast, the *Darden* test "encompasses virtually any individual" participating in an ERISA-covered plan. *Sica v. Equitable Life Assurance Society*, 756 F. Supp. 539, 542 (S.D. Fla. 1990) (rejecting the *Darden* standard and adopting agency principles for ERISA purposes).

One of the stated purposes of ERISA is to provide uniform law governing benefits arrangements of businesses operating in a number of jurisdictions. *See, e.g., Penn*, 898 F.2d at 1102 n.6. Through its expansive "employee" standard, the Fourth Circuit has undermined the otherwise uniform understanding of ERISA. Thus, in each de-

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[8] *E.g.*, Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee, 89th Cong., 2d Sess. (April-May 1966); Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. (December 1969, February-May 1970); Hearings on H.R. 1269 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (April 1971); Hearings on H.R. 2 and H.R. 462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. (Feb.-April, June 1973).

[9] *E.g.*, S. Rep. No. 127, 93d Cong., 1st Sess. (1973); S. Rep. No. 383, 93d Cong., 1st Sess. (1973); H. Rep. No. 533, 93d Cong., 1st Sess. (1973); H. Rep. No. 779, 93d Cong., 2d Sess. (1974); H. Rep. No. 807, 93d Cong., 2d Sess. (1974); H. Rep. No. 1280, 93d Cong., 2d Sess. (1974) (conference report); S. Rep. No. 1090, 93d Cong., 2d Sess. (1974) (conference report).

[10] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). This Court has consistently declined to modify judicially the legislative judgments embedded in the statutory scheme of ERISA. *See, e.g., Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365 (1990) (declining to approve an exception for employee malfeasance or criminal misconduct to the unqualified ERISA prohibition on the assignment or alienation of benefits); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

cision outside the Fourth Circuit involving a former Nationwide agent, the agent has been held not to be Nationwide's "employee" for ERISA purposes.[11] The application of an inconsistent legal standard within the Fourth Circuit will adversely affect the ability of Nationwide (as well as the numerous other businesses that utilize independent contractors as sales agents or in other capacities) to operate and maintain any arrangement for its agents that might be thought to be an ERISA plan. Such a result is neither contemplated nor warranted under ERISA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 22, 1991

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[11] *See, e.g., Wolcott, supra; Plazzo, supra.* The same conclusion was reached in unpublished District Court decisions in the Second and Sixth Circuits. *See Sciara v. Nationwide Ins. Companies,* No. 87-2815-4A (W.D. Tenn. March 30, 1990) (reprinted in App. at 59a); *Harlow v. Nationwide Mutual Ins. Co.,* No. N-84-503 (JAC) (D. Conn. June 19, 1987) (Cabranes, J., bench ruling) (reprinted in App. at 68a).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2759

ROBERT T. DARDEN,
Plaintiff-Appellee,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellants.

No. 89-2760

ROBERT T. DARDEN,
Plaintiff-Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Fayetteville
Terrence W. Boyle, District Judge
(CA-83-96-3-CIV)

Argued: April 3, 1990 Decided: January 7, 1991

Before HALL, MURNAGHAN, and SPROUSE, Circuit Judges.

Affirmed by published opinion. Judge Sprouse wrote the opinion, in which Judge Hall and Judge Murnaghan joined.

ARGUED: George Robinson Ragsdale, LEBOEUF, LAMB, LEIBY & MACRAE, Raleigh, North Carolina, for Appellants. Marion G. Follin, III, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES, HARKAVY & LAWRENCE, Greensboro, North Carolina, for Appellee. ON BRIEF: Craig G. Dalton, Jr., LEBOEUF, LAMB, LEIBY & MACRAE, Raleigh, North Carolina; Margaret M. Richardson, W. Mark Smith, SUTHERLAND, ASBILL & BRENNAN, Washington, D.C., for Appellants.

SPROUSE, Circuit Judge:

Robert T. Darden, a former insurance agent for Nationwide Mutual Insurance Company (Nationwide), sued Nationwide for payments under the latter's post-employment compensation plan—Agent Security Compensation Plan (the ASCP). Nationwide had refused to pay Darden ASCP benefits after his termination because he had violated his agreement "not to compete" with Nationwide, but Darden contends that the Employee Retirement Income Security Act (ERISA) governs his contract and that the vesting requirements of ERISA prevent enforcement of the ASCP forfeiture provisions against him. The district court held that Darden was an "employee" for purposes of ERISA, but that only part of the ASCP qualified under the ERISA definition of a pension plan. It held Darden could recover that portion of the ASCP. Nationwide appeals and Darden cross-appeals. We affirm.

I.

This case has been in litigation for seven years and we have it now for the second time. The facts were fully related in our first opinion, *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701 (4th Cir. 1986) ("*Darden I*"), and need only be summarized here. Darden worked for Nationwide from September 1960 until November 1980. Darden's contract with Nationwide provided for his participation in a retirement and deferred compensation plan for insurance agents—the ASCP. The ASCP has two components—a Deferred Compensation Incentive Credit Plan and an Extended Earnings Plan. The Deferred Compensation Plan was funded as an agent retirement plan by Nationwide's annual contributions based on an agent's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay agents upon their retirement, termination, death or disability, a sum equal to their earnings from renewal fees over the prior twelve months.

The agency agreement, however, provided that Nationwide's obligation to pay benefits under the ASCP would terminate if an agent engaged in certain insurance businesses, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the agent's former business location. Nationwide's obligation would also cease if the agent, at anytime after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. Further, the agency agreement between Nationwide and the agent provided that either party had the right to cancel the agreement at any time after written notice had been given.

Nationwide terminated its agency contract with Darden in November 1980. One month later, Darden opened a new business as an independent insurance agent and proceeded to represent various competitors of Nationwide. Moreover, Darden operated the new business at the same

location he had previously used as a Nationwide agent. Consequently, Nationwide notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the ASCP. In November 1983, Darden brought suit under ERISA to recover the benefits.

Under ERISA, benefits from a pension plan become nonforfeitable after the plan has vested.[1] *See* 29 U.S.C. § 1053(a); *Petr v. Nationwide Mut. Ins. Co.*, 712 F. Supp. 504, 506 (D. Md. 1989). The nonforfeitability provision protects only "employees" and then only if the benefit arrangement is an employee "pension benefit plan." *See* 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(7); *Wolcott v. Nationwide Mut. Life Ins.*, 884 F.2d 245, 250 (6th Cir. 1989). In May 1985, the district court granted Nationwide's motion for summary judgment on the ground that Darden did not qualify as an "employee" within the scope of ERISA and, therefore, had no enforceable rights against Nationwide under ERISA. On appeal, we vacated the district court's judgment, holding that the traditional common-law test for determining the meaning of "employee," which the district court had applied, was "not the appropriate standard" to apply in a case arising under ERISA. *Darden I*, 796 F.2d at 706. Our *Darden I* opinion set forth a three-part test for determining whether an individual is an employee as contemplated by ERISA. To qualify as an "employee," a claimant must establish: (1) that he had a reasonable expectation that he would receive the benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of the forfeiture provisions. *Id.* at 706-07. We held that the first prong of the three-part test had been satisfied, concluding

[1] The vesting period is determined by one of three methods. *See* 29 U.S.C. §§ 1053(a)(2)(A), 1053(a)(2)(B), and 1053(a)(2)(C). Under any of the three methods, Darden's agreement vested. *Darden I*, 796 F.2d at 703 n.1.

that by "establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." *Id.* at 707. However, the case was remanded for further factual findings relating to the second and third prongs.

On remand, the district court found that Darden both relied on the benefits plan and lacked sufficient economic bargaining power to contract out of the forfeiture clauses. It concluded that Darden was an "employee" under ERISA. The district court also found that the Deferred Compensation Plan was a "pension plan" for purposes of ERISA and awarded Darden the benefits he had accrued under that component of the ASCP. The court, however, in a summary judgment ruling held that the Extended Earnings Plan was not a "pension plan" and accordingly denied Darden those benefits.

II. Darden's Status as an Employee

Since we had determined in *Darden I* that Darden had satisfied the first prong of the three-part "employee" test, the chore on remand was to decide if Darden satisfied the other two prongs of the *Darden I* definition of "employee." Our *Darden I* opinion, however, did not leave the page on the remainder of the definition completely blank. We outlined the parameters of the reliance requirement, stating that persons within the protected class must have relied on that expectation of retirement payments by remaining for " 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for their retirement." *Darden I*, 796 F.2d at 706. We found that Darden's many years of service and his having foregone equity (since upon his termination all rights revert back to Nationwide) evidenced his reliance. *Darden I*, 796 F.2d at 707. However, we also stated that there was no indication in the record as to whether Darden pursued other

methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan or whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents. *Id.*

The district court found that Darden had pursued alternative means of providing for his retirement. Darden had eight life insurance contracts worth $22,300 in 1980 and he had approximately $60,000 in mutual funds and cash deposits. Finally, Darden had an annuity with a cash surrender value in 1980 of $9,400 and IRA investments totalling $8,402. However, the district court concluded that these amounts "did not significantly reduce [Darden's] reliance" on the benefits plan and that Darden satisfied the second prong of the definition because he had relied on his benefit plan.

The district court also found that Nationwide explicitly encouraged its agents to rely on the ASCP as a means for providing for their retirement. An audio-visual program, prepared by Nationwide in 1980 to explain the ASCP to its agents, stated:

> Your [Deferred Compensation Plan] is a foundation upon which to build a total retirement plan. Along with such plans as HR-10's and IRA's, it can provide a more-than-adequate retirement income. The other part of the foundation is Extended Earnings.

The court found that Darden, like most Nationwide agents, did not invest in the Nationwide Retirement Plan (the HR-10 Plan) and that over forty percent of Nationwide agents had neither an IRA nor an HR-10 Plan. It concluded that, in light of Nationwide's explicit encouragement and the common practices of other Nationwide agents, Darden's reliance on the ASCP was "reasonable."

On appeal, Nationwide argues that the three-prong test outlined in *Darden I* is inappropriate and that this court,

like other courts of appeals have done, should determine an employee's status under ERISA according to common-law principles. *See Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250-51 (6th Cir. 1989); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987). That, however, is an argument wasted on this panel, for *Darden I* is, of course, controlling precedent in this circuit.

Nationwide also contends that the district court's finding that Darden relied on the plan was clearly erroneous. It argues that Darden was a self-reliant entrepreneur, wholly responsible for his current income, and not a financial "dependent" of Nationwide. Concomitantly, it urges that the other advantages of Nationwide affiliation, such as the quality of insurance offered by Nationwide, competitive premium rates and name recognition, provided the true inducement for Darden's services. Nationwide also stresses that Darden actively pursued a number of financial arrangements that significantly reduced any reliance on the ASCP, and that any failure to make alternative provisions would have been unreasonable in light of the common practices of other Nationwide agents. Finally, in this factual context, Nationwide argues that the district court erred in limiting its consideration of Darden's alternative retirement arrangements to formal savings plans and instead should have also considered the personal assets accumulated by an individual during his working lifetime.

Several of Nationwide's contentions, such as the inducement to work for Nationwide and Darden's alleged status as an independent entrepreneur, have little to do with the relevant inquiry—whether Darden relied on these benefits. Nationwide's other contentions challenge the factual findings of the district court and, after a thorough review of the record, we cannot conclude that the findings were clearly erroneous.

Concerning the third prong of the employee test, the district court found that there was a "significant" dis-

parity in bargaining power between Nationwide and its agents. We agree. Although Nationwide received input from its agents through the Agent Company Advisory Council, Nationwide did not obligate itself to heed such advice. The record indicates that Nationwide specifically rejected proposals by Nationwide agents to change the forfeiture clauses. In fact, Nationwide never suggests that Darden had sufficient economic bargaining power. Consequently, the district court correctly concluded that Darden "lacked sufficient economic bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide."

In sum, we agree with the district court's conclusion that Darden was an employee under ERISA.

III. The Deferred Compensation Plan

The protections flowing from "vesting" under ERISA apply only to a "pension plan." "Pension plan" and "employee pension benefit plan" are defined as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A).

The Deferred Compensation Plan is financed through contributions made by Nationwide on the agent's behalf to a group annuity fund. The contribution for each agent is based upon a percentage of the original and renewal fees which he has earned. The agent is eligible to participate in the plan after completion of five years of service. A plan participant may elect to receive early reduced deferred compensation benefits at his termination upon reaching age 50 with the percentage of benefits payable gradually increasing up to age 60. Benefits are paid over a period of three to ten years or as a life annuity.

Darden elected to have his benefits paid in the form of a life annuity. At the time of his termination in 1980, Darden had accumulated deferred compensation incentive credits totalling $28,664.56. These credits were to be deferred until Darden's 60th birthday on June 1, 1994, when lifetime monthly payments would commence on the basis of annuity rates then in effect. The monthly amount would have been approximately $205.

Based on these facts, the district court concluded that Nationwide's Deferred Compensation Plan "provides retirement income to employees and is an employee pension benefit plan under ERISA." Nationwide disagrees, contending that the Deferred Compensation Plan was not intended to serve as a pension plan but that it was designed to offer an incentive to agents during their working careers. For that reason, Nationwide points out, the plan "disproportionately reward[s]" those persons who generate more sales and therefore earn greater commissions.

We agree with the district court that the Deferred Compensation Plan represented an ERISA "pension plan," which provided retirement income to employees or resulted in the deferral of income extending beyond the

termination of employment.[2] Nationwide represented that the Deferred Compensation Plan was a retirement plan. Nationwide's own witnesses acknowledged that one of the purposes of the Plan was to provide retirement benefits and its audio-visual suggested the same. Darden, like other Nationwide agents, considered the payments as part of their retirement scheme.[3]

IV. The Extended Earnings Plan

The Extended Earnings Plan compensates an agent by paying him a sum equal to his earnings from renewal fees over the prior twelve months. The district court, basing its decision largely on our holding in *Fraver v. North Carolina Farm Bureau Mut. Ins. Co.*, 801 F.2d 675 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987),

[2] In addition to the court below, three other district courts have reached similar conclusions concerning the plan we consider here. *See Plazzo v. Nationwide Mut. Ins. Co.*, 697 F. Supp. 1437, 1450 (N.D. Ohio 1988) ("[i]n view of the benefit accrual and distribution features of the Deferred Compensation Plan, the court concludes that it provides retirement income to employees and is an employee pension benefit plan under ERISA"), *rev'd on other grounds*, 892 F.2d 79 (6th Cir.), *cert. denied*, 111 S. Ct. 370 (1990); *Wolcott v. Nationwide Mut. Ins. Co.*, 664 F. Supp. 1533, 1538 (S.D. Ohio 1987) ("[t]he Court concludes that the Deferred Compensation Plan provides retirement income to employees and is an employee pension benefit plan under ERISA"), *rev'd on other grounds*, 884 F.2d 245 (6th Cir. 1989); *Petr v. Nationwide Mut. Ins. Co.*, 712 F. Supp. 504, 507 (D. Md. 1989) ("the Court . . . join[s] these [other] courts in concluding that the [Deferred Compensation] Plan is a pension plan within the meaning of ERISA") (emphasis omitted).

[3] In *Darden I*, we also directed the district court to consider whether the ASCP fell within an ERISA exception, which exempts any plan which is unfunded and applicable only to a select group of highly compensated employees. *Darden I*, 796 F.2d at 708-09; 29 U.S.C. § 1051(2). On remand, the district court held that while the Deferred Compensation Plan was unfunded, it did not apply to a select group of highly compensated employees. On appeal, Nationwide does not contest this conclusion.

held that the Extended Earnings Plan did not constitute a pension plan under ERISA. In *Fraver*, we addressed a benefits plan similar to the Extended Earnings Plan at issue in the instant case. In *Fraver*, as here, the insurance company agreed to pay an amount equal to the renewal commissions of the final twelve months following termination of service. In concluding that such an agreement did not constitute a pension plan, we stated:

> The post-termination benefits are calculated on the basis of the agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended term.
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> . . . .
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> The amount of the payment is tied to only one factor, the amount of business in the last year prior to termination. Finally, the payments are recouped from the individual's successor. In sum, the benefits are in the nature of a buy-out in which the departing agent receives payments based on what he leaves behind in the way of business for his successor. If the departing agent goes into competition with his successor, he is destroying the resource that would be used to pay him.

Fraver, 801 F.2d at 678.

On his cross-appeal, Darden contends that the Extended Earnings Plan, like the Deferred Compensation Plan, is a pension plan. He argues that the ASCP is a single plan and if we hold that the Deferred Compensation Plan is a pension plan we likewise must find the Extended Earnings Plan to be a pension plan. We disagree. While both the Deferred Compensation Plan and the Extended Earnings Plan are components of a single plan, they have distinct purposes, employ distinct terms and impose distinct obligations. The district court did not err in analyzing the plans separately.

Darden relies on *Plazzo v. Nationwide Mut. Ins. Co.* in support of his position. In *Plazzo*, an Ohio federal district court held that an Extended Earnings Plan, such as the one at issue in the instant case, is not a "buy-out," but rather a pension plan. *Plazzo*, 697 F. Supp. at 1450-51. Darden impliedly requests that we discard the holding in *Fraver* and adopt the position taken by the court in *Plazzo*. However, two other district courts, analyzing the same issue, concluded that an Extended Earnings Plan is not a pension plan under ERISA. *See Petr*, 712 F. Supp. at 507; *Wolcott*, 664 F. Supp. at 1539. More importantly, the Extended Earnings Plan at issue here closely parallels the benefit agreement in *Fraver* and the outcome here is controlled by that precedent.

In view of the above, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,
Plaintiff

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Defendants

MEMORANDUM OPINION

[Filed July 5, 1989]

Robert T. Darden, a former insurance agent for Nationwide Mutual Insurance Company, brought this action against Nationwide on November 8, 1983, seeking to recover retirement benefits pursuant to the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* This court initially granted Nationwide's motion for summary judgment on the ground that Darden did not qualify as an employee within the scope of ERISA and therefore had no enforceable rights against Nationwide under the Act. This decision was vacated on appeal to the Fourth Circuit, which held that the traditional common law test applied by this court for identifying the relationship of master and servant was "not the appropriate standard for application here." *See Darden v. Nationwide Mutual Insurance Company*, 796 F.2d 701, 706 (4th Cir. 1986). The Court of Appeals set forth a three-part test

for determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA. The case was remanded for further factual development in light of the new standard, and the parties subsequently filed cross-motions for summary judgment which were denied. A two-day bench trial was held, and the court is now prepared to enter its findings.

I. BACKGROUND

The facts of this case were summarized by the Fourth Circuit as follows:

> From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than through a fixed salary.
>
> The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to

> pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months. The agency agreements also provided for Nationwide's obligation to pay benefits under the Agency's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden provided further that either party had the right to cancel the agreement at any time after written notice.
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> Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan.
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> * * * *
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> Darden filed the present action on November 8, 1983, seeking to benefit from the terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Under ERISA, an employee's right to receive retirement benefits from an employer-sponsored retirement plan must vest, there-

> by becoming nonforfeitable, after a period of time to be determined according to one of three alternative methods. 29 U.S.C. § 1053(a). [footnote omitted] Darden based his claim to relief on § 502(a) of the Act, 29 U.S.C. § 1132(a), which provides that a participant in or a beneficiary of an employee retirement income security plan may bring a civil action to enforce the provisions of the Act and to recover benefits due to him. Darden accordingly sought to enforce the Act's nonforfeitability requirements and to recover the benefits claimed to be due to him under the provision of Nationwide's Agent's Security Compensation Plan.

796 F.2d at 702-04.

The Court of Appeals identified three factors to be considered in determining whether an individual is an employee within the meaning of ERISA: (1) Whether the "employer" or sponsor of the pension plan took some action that created a reasonable expectation on the "employees'" part that benefits would be paid to them in the future; (2) whether persons within the protected class relied on that expectation by (a) remaining for "long years," or a substantial period of time, in the "employer's" service, and (b) by foregoing other significant means of retirement; and (3) whether the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. 796 F.2d at 706-07.

The Court found that the first prong of this test had been satisfied: "By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." 796 F.2d at 707. The record was found to be incomplete, however, with respect to the second two prongs concerning reliance and bargaining power.

Nationwide argued on appeal that, even if Darden is assumed to be an employee for purposes of ERISA, its plan is not subject to the vesting and nonforfeitability requirements of § 1053(a) by virtue of § 1051(2), which exempts from those requirements any plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." The Court found that disputed questions of fact prevented summary judgment disposition of this issue.

Upon remand, further discovery was conducted, and the parties filed cross-motions for summary judgment. This court, applying the reasoning of *Fraver v. North Carolina Farm Bureau*, 801 F.2d 675 (4th Cir. 1986), found that the Extended Earnings component of the Agent's Security Compensation Plan is not a "pension plan" within the meaning of ERISA. However, this court declined to summarily judge whether the Deferred Compensation component is a "pension plan" or whether Darden was an "employee" under ERISA. A two-day bench trial was held to resolve the factual questions underlying these two issues and also the issue of whether the Deferred Compensation Plan qualifies for the "top-hat" exemption under § 1051(2).

II. IS DARDEN AN "EMPLOYEE" WITHIN THE MEANING OF ERISA?

The employment issue is to be resolved by applying the three criteria devised by the Fourth Circuit for determining whether an individual is an employee under ERISA. The Court of Appeals found that the first prong concerning whether Darden had a reasonable expectation of retirement benefits was satisfied, based on the comprehensive retirement benefits program created by Nationwide for its insurance agents. This court therefore need only address the second and third prongs of the

ERISA employment test dealing with reliance and bargaining power.

A. *Reliance*

Darden must have relied on the expectation of retirement benefits by (1) remaining as a Nationwide agent for a substantial period of time and by (2) foregoing other significant means of providing for his retirement. *See Darden*, 796 F.2d at 706. His eighteen years of service, which the Court of Appeals noted exceeds the time required for the vesting of benefits under any of the three methods described in 29 U.S.C. § 1053(a), is clearly a substantial period. With respect to the loss of retirement opportunities, the Court found that "Darden was obliged to forego at least one alternative method of providing for his retirement that would normally have been available to an independent contractor: because much of the value of a Nationwide agency reverted to Nationwide upon the agent's termination, Darden was not able to build up equity in his business which could have eventually been transformed into cash through the sale of the business." *Id.* at 707. However, the Court also found that "there is no indication in the record as to whether Darden pursued other methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan. Nor is there any evidence as to whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents." *Id.* These two questions—whether Darden made alternative provisions for his retirement and, if not, whether the failure to do so was reasonable—must now be decided.

At the time of his termination in 1980, Darden had accumulated Deferred Compensation Incentive Credits totalling $28,664.56. These credits were to be deferred until Darden's 60th birthday on June 1, 1994, when lifetime monthly payments would commence on the basis of

annuity rates then in effect. The monthly amount, assuming no change in rates between December 1, 1980 and June 1, 1994, would have been $205.57. Darden's personal net worth when he was terminated, disregarding the retirement benefits at issue here and the value of his agency, was approximately $450,000. His assets included eight life insurance contracts with a total cash surrender value in 1980 of $22,300, shares in mutual funds totalling $33,267, and deposits at several banks of approximately $27,000. Darden's financial planning for retirement, again leaving aside the Nationwide plan, consisted of an annuity with a cash surrender value in 1980 of $9,400 which will produce monthly payments of $134.75 beginning in 2004, and IRA investments totally $8,402. Although Darden therefore did pursue alternative means of providing for his retirement, the court finds that the amounts invested did not significantly reduce his reliance on the deferred compensation benefits.

Nationwide explicitly encouraged its agents to rely on the Agent's Security Compensation Plan as a means of providing for their retirement. An audio-visual program prepared by Nationwide in 1980 to explain the plan to its agents stated:

> Your DCIC [Deferred Compensation Incentive Credit] is a foundation upon which to build a total retirement plan. Along with such plans as HR-10's and IRA's, it can provide a more-than-adequate retirement income. The other part of the foundation is Extended Earnings.

Like most Nationwide agents, Darden did not invest in the Nationwide Agents' Retirement Plan, a Keogh (HR-10) plan. A study was conducted by Nationwide's Office of Research to determine the reasons for low participation in this plan. According to the 1983 Final Report, only 4% of the agency force participated in the Nationwide Agents' HR-10 Plan, and only 28.8% of the agents

surveyed had an HR-10 plan of any kind. 42.6% of the agents reported having an IRA, 42% had neither an IRA nor an HR-10, and just 13% had both an HR-10 and an IRA. The court concludes that, although Darden had the financial resources to reduce his reliance on the Deferred Compensation Plan, his failure to do so was reasonable in light of both the common practices of other Nationwide agents and Nationwide's explicit encouragement of its agents to rely on the plan.

B. *Bargaining Power*

The third factor to be considered in determining whether Darden is an "employee" under ERISA is whether he "lacked sufficient bargaining power to obtain contractual rights to nonforfeitable benefits." 796 F.2d at 707. The Court of Appeals noted that "[e]vidence of the extent of the 'employer's' control may, of course, be relevant to a determination of relative bargaining power." *Id.* Nationwide points out that this court previously determined, and the Court of Appeals strongly implied, that Nationwide lacked the control over Darden necessary to establish employee status under the traditional common law standard. *See id.* at 705. This court found the parties' relationship was such that "it was primarly through the plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide." *Darden v. Nationwide Mutual Insurance Co.*, No. 83-96-CIV-3 (E.D.N.C. May 22, 1985). In other words, the terms of the relationship between Darden and Nationwide gave Darden enough control over his own business activities for him not to be considered an employee under the traditional common law standard. The bargaining power element of the new standard, however, does not concern the control *allowed* by the terms of a business relationship, but rather the control *over* those terms. The fact that the terms of Darden's relationship with Nationwide

gave Darden extensive control over his business activities does not necessarily mean that Darden, or Nationwide agents generally, had sufficient power to bargain over those terms. Indeed, the evidence is that they did not.

The eight successive Agent's Agreements signed by Darden during his service with Nationwide were uniform and signed by all Nationwide agents in North Carolina. An agent was required to sign the uniform agreement as a condition of his service. An outline of changes in the agreement made in 1980 advised agents that "[a]s in the past, our position will be that any agent refusing to sign the new Agreement will have his or her existing Agreement cancelled as of 1/1/81." Although Nationwide received input from its agents via the Agent Company Advisory Council, the Council's role was simply that: advisory. Nationwide was not obliged to follow any advice it received from the Council. More importantly, Nationwide clearly felt free to disregard any advice it received, as evidenced by the 1978 Advisory Council Meeting at which the benefit forfeiture provisions at issue here were discussed. According to the minutes of that meeting:

> [T]here was a concern expressed regarding vesting of deferred compensation. One delegate felt that any Deferred Compensation Incentive Credits should be fully and permanently vested in the writing agent's name with no losses possible through either qualified or non-qualified cancellation of the Agent Agreement.
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> Mr. Wagner [Nationwide's Vice-President for Margeting Services] responded regarding the vesting of DCIC . . . .
>
> The Companies have no intention of making Agent Security Compensation payments and then permitting the agent to compete with the Companies for

> the business in the portfolio. The Independent Contractor or agent can choose to compete for the business and forego benefit payments or accept benefit payments and not compete.

At the same 1978 meeting one delegate proposed that a retiring agent should have the right to negotiate a separate agreement with another Nationwide agent to transfer the agency, instead of it reverting to Nationwide.[1] Mr. Wagner responded that "[a]s far as an agent negotiating with someone else, in order for a contract to exist, there must be agent ownership of the business. He said that at Nationwide that was not the case and there was no possibility of that occurring." The Advisory Council's various recommendations to increase Extended Earnings were also rejected, due to unforeseen increases in the cost of funding the Agent's Security Compensation Plan:

> Mr. Wagner said that this type of increase had not been anticipated in the original projections and there could be problems in the future. Additional dollars would have to come from increased productivity. There was no way that it was possible to increase the Extended Earnings through the suggestions which had been made.

Of course, a party's intransigence with respect to any particular contractual provision could merely reflect the importance it attaches to that provision and not necessarily a general superiority in bargaining power. But when a party takes a "hard-line" position over a broad range of issues, as Nationwide appears to have done, the latter conclusion is inevitable. The court thus finds there is a significant disparity in bargaining power between

[1] The Court of Appeals noted that this reversion deprived Darden of a means of providing for his retirement, since he was unable to build up equity in his business which could be eventually be transformed into cash through its sale. *See* 796 F.2d at 707.

Nationwide and its agents. Specifically, the court finds that Darden, and Nationwide agents as a group, lacked sufficient economic bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide.

The court concludes that Darden was an employee of Nationwide within the meaning of ERISA, 29 U.S.C. § 1002(6).

III. IS THE DEFERRED COMPENSATION PLAN A "PENSION PLAN" UNDER ERISA?

ERISA defines the terms "pension plan" and "employee pension benefit plan" as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1002(2)(A). Under the Deferred Compensation Plan, agents who have completed five years of service with Nationwide are annually credited with a specified percentage of their original and renewal fees from the previous year. The plan is financed through deposits made by Nationwide into a group annuity fund. Participants may receive early reduced benefits upon retirement or cancellation at age 50 or one hundred percent

of accrued benefits commencing at age 60. Benefits are payable over a three-year period unless a longer payout schedule is elected. The court concludes, as have two other courts, that Nationwide's Deferred Compensation Plan provides retirement income to employees and is an employee pension benefit plan under ERISA. *See Plazzo v. Nationwide Mutual Insurance Co.*, 697 F. Supp. 1437, 1450 (N.D. Ohio 1988); *Wolcott v. Nationwide Mutual Insurance Co.*, 664 F. Supp. 1533, 1539 (S.D. Ohio 1987).

IV. IS THE DEFERRED COMPENSATION PLAN AN UNFUNDED PLAN MAINTAINED PRIMARILY FOR THE PURPOSE OF PROVIDING DEFERRED COMPENSATION FOR A SELECT GROUP OF HIGHLY COMPENSATED EMPLOYEES?

29 U.S.C. § 1051(2) exempts from the vesting and nonforfeitability requirements of § 1053(a) any pension plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." The Court of Appeals remanded the issue of whether this "top-hat" exemption applies to the Nationwide plan because the relevant facts were in dispute.

A. *Is the plan "funded"?*

The Nationwide defendants set aside money for the payment of deferred compensation benefits by making annual deposits into an "accumulation fund" maintained by defendant Nationwide Life Insurance Company pursuant to a group annuity contract. The amounts deposited generally reflect the present dollar value of the future benefits accrued during that year. The accumulation fund is credited with interest earned and debited for expenses. Withdrawals may be made from the fund at any time and for any reason upon written notice.

When one of the Nationwide defendants notifies Nationwide Life that an annuity is to be purchased on the life of a specified person, Nationwide Life withdraws the necessary amount from the fund and commences payment of the annuity to the purchasing company.

The ERISA statute does not define the term "unfunded plan." However, the Eighth Circuit has stated that "[f]unding implies the existence of a *res* separate from the ordinary assets of the corporation." *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214 (8th Cir. 1981). *Accord, Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249, 1251-52 (D. Md. 1983). In *Dependahl* the employer purchased life insurance policies on the lives of certain employees, whose named beneficiaries were to receive annuity income benefits upon the employee's death. The Eighth Circuit affirmed the district court's finding that this was a funded plan:

> All whole-life insurance policies which have a cash value with premiums paid in part by corporate contributions to an insurance firm are funded plans. The employee may look to a *res* separate from the corporation in the event the contingency occurs which triggers the liability of the plan.

653 F.2d at 1214. This holding was subsequently distinguished by the Eighth Circuit in *Belsky v. First National Life Insurance Company*, 818 F.2d 661 (8th Cir. 1987). *Belsky* involved an executive compensation plan which provided for a bank to "informally fund the benefits" by purchasing life insurance policies on each participating employee. *See Belsky v. First National Life Insurance Co.*, 653 F. Supp. 80, 82 (D. Neb. 1986). As the sole owner and beneficiary of these policies, the bank could pay its obligations either by using the cash value of the policies or by using other funds. The bank's obligations were set forth in separate agreements entered into with each employee. These agreements provided that

any insurance policy or other asset acquired by the bank in connection with its liabilities under the agreement would not be held in trust for the employee's benefit, but instead "shall be, and remain, a general, unpledged, unrestricted asset of the Bank." The district court found that this was an unfunded excess benefit plan not covered by ERISA. *See* 29 U.S.C. § 1003(b)(5). The Eighth Circuit affirmed, distinguishing *Dependahl* as follows:

> Belsky's agreement with the Bank is in sharp contrast to the terms of the *Dependahl* plan. First, in addition to death benefits, Belsky's agreement also provides for retirement and disability benefits . . . . Mort importantly, the agreement does not mandate that the Bank had or would acquire assets to finance the liabilities assumed in the agreement. While it is evident that the Bank obtained the insurance policy with the intention that it could be used in funding the Plan, the language of the Plan, unlike that of the *Dependahl* plan, specifically avoids making a direct tie between the insurance policy and the Plan. . . . Under the plan as drawn, the cash value of the policy simply became a general, unpledged, unrestricted assest of the Bank and those Bank assets in turn would be used to fund Beksky's plan. Thus, we cannot conclude that the district court erred in finding that there was no *res* separate from the corporation to which Belsky could look to satisfy the liability of the plan. In short, the Bank's plan so differs from the one in *Dependahl* that *Dependahl* is not controlling.

818 F.2d at 663-64.

Dependahl is inapplicable here for similar reasons. Darden's agreement with Nationwide, like Belsky's agreement with the bank, did not require Nationwide to acquire assets to finance its deferred compensation liabilities. The money which Nationwide sets aside for the

purchase of life annuities does not necessarily correspond to the value of the deferred compensation credits which have accrued. Nor is this money committed to the payment of deferred compensation benefits, since the group annuity contract does not restrict Nationwide's right to use the accumulation fund for general corporate purposes. Indeed, one million dollars were withdrawn from the fund in 1986 to meet general cash-flow obligations. Conversely, Nationwide is free to purchase the life annuities out of other assets. The accumulation fund, like the life insurance policies in *Belsky*, is a general, unpledged, unrestricted asset which Nationwide uses to meet its deferred compensation obligations. The fund is not a *res* separate from the defendant corporations to which Darden could look to enforce his entitlement under the plan. The court therefore finds that the Deferred Compensation Plan is an "unfunded" plan for purposes of the top-hat exemption.[2]

B. *Is the plan limited to a "select group of management or highly compensated employees"?*

In addition to being "unfunded," the Deferred Compensation Plan must also be limited to a "select group of management or highly compensated employees" in order to qualify for the exemption from ERISA's vesting and nonforfeitability requirements. Two courts have found that the plan is not so limited and therefore not exempt. *See Plazzo, supra*; *Wolcott, supra*. Both of these opinions focus on the "highly compensated" language without treating the "select group" language as a separate and

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[2] This finding is contrary to, but not inconsistent with, the conclusion reached in *Wolcott, supra*, 664 F. Supp. at 1539, that the Deferred Compensation Plan is funded. Nationwide presented no evidence in that case to rebut the plaintiff's affidavit testimony in support of a motion for summary judgment that the plan is funded and that benefits accrue on an annual basis in a group annuity contract. The court therefore had no choice but to find for the plaintiff on this issue.

distinct requirement. The Court of Appeals noted in the present case, however, that "[t]he term 'select group' seems to imply a small percentage of the total number." *Darden*, 796 F.2d at 708. It remanded this question since there was no evidence in the record as to the percentage of Nationwide's total employee complement who participated in the Agent's Security Compensation Plan. A separate analysis of the "select group" and "highly compensated" provisions is therefore appropriate.

(1) "Select group"

The parties disagree as to which agents should be counted as participants in the plan for purposes of determining whether they comprise a "select group." ERISA defines the term "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any kind from an employee benefit plan . . ." 29 U.S.C. § 1002(7). Darden focuses on the "may become eligible" language in arguing that the plan participants include not only all Nationwide agents who have entered into the standard agent's agreement, but also the "NADP agents" who are in training during their initial two years of employment and have not entered into the standard agreement. Since these agents are not eligible to participate in the company-wide pension plan but may become eligible for the Agent's Security Compensation Plan, Darden contends they should be counted as participants in the plan. The average number of agents during the years 1976, 1977, 1979 and 1980, including the NADP agents, was 5316 out of a total average workforce of 20,544, or 25.9%. Nationwide argues, on the other hand, that only those agents who have completed five years of service should be counted as plan participants, since the plan requires five years of service to qualify for benefits. The average number of agents with five years service in the years 1976, 1979 and 1980 was 3272 out of a total average workforce of 20,845, or 15.7%.

Nationwide's proposed method of calculating the number of plan participants was rejected in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 643 F. Supp. 633, 641 (E.D.N.C. 1985), rev'd on other grounds, 801 F.2d 675 (1986):

> The five year service requirement is not a plan parameter defining who was covered by the plan, but is a vesting provision equally applicable to all plan members. That a vesting provision is not to be considered as a plan parameter is clearly indicated by the definition of "participant" in ERISA . . .

Nationwide nevertheless argues that the *Fraver* court incorrectly decided this question and that its five year service requirement is not a vesting provision but rather a condition of eligibility for participating in the Deferred Compensation Plan. However, the distinction between vesting and eligibility requirements is irrelevant for determining who is a plan participant under ERISA, since included within the statutory definition of "participant" are employees who "may become eligible to receive a benefit." Thus, those employees who have not satisfied the eligibility requirements for the plan must still be counted as "plan participants" if they *may* satisfy those requirements. In other words, the relevant question is not whether the employee *has* satisfied the eligibility requirements, but whether he is *eligible* to satisfy the eligibility requirements. Since all Nationwide agents who have entered into the standard agent's agreement "may become eligible" for deferred compensation benefits by completing five years of service, they should all be counted as participants in the plan. As in *Fraver*, 643 F. Supp. at 633, "[t]he employment contracts of *all* such persons contain the plan provisions . . ." On the other hand, since the employment contracts of the NADP agents do not contain the plan provisions, they should not be counted as participants. Darden is, of course, correct that these agents may become eligible for deferred compensation benefits

by entering into the standard agreement and completing five years service. But that is no less true of any other employee at Nationwide. To aviod the absurd result of counting all employees as plan participants, the court finds that only those agents who have entered into the standard agent's agreement should be so counted. The average number of such agents during the years 1976, 1977, 1978, and 1980 was 3841 out of a total average workforce of 20,544, or 18.7%.

Having identified the relevant "group" and its size as a percentage of the total workforce, the next question is whether this group is "select." Prior cases, as noted above, have not analyzed the "select group" provision separately from the "highly compensated employee" provision. Indeed, only one court has even bothered to identify the group in question as a percentage of the total workforce. *See Belka v. Rowe Furniture Corp., supra* at 1252 (plan covering only 4.6% of total employees was limited to a select group of highy compensated employees). The only other authority on this point is two opinion letters by the Department of Labor holding that plans covering fewer than 4% and 0.2% of employees were limited to select groups. *See* U.S. Department of Labor Opinion Letters 75-64 (August 1, 1975) and 75-48 (December 23, 1975). Although these decisions do not demarcate the upper range of "select groups," the court finds that the group in question here, comprising almost one-fifth of the total Nationwide workforce, is too large to be considered "select" for purposes of the top-hat exemption.

(2) "Highly compensated"

The average gross income (commissions plus benefits) for Nationwide agents (excluding NADP agents) in 1980, the year Darden was terminated, was $49,340. The 1980 average total compensation (salarly plus benefits) for all non-agent employees was $19,121 and for management

employees was $24,501. As the Court of Appeals pointed out, however, the agents' compensation must be adjusted "so as to be comparable to the compensation paid to salaried employees." *Darden*, 796 F.2d at 709. Such an adjustment requires subtracting the agents' business expenses from their gross income, expenses which salaried employees do not incur. According to the 1980 "Agent's Office Management Guide," prepared to enable agents to compare their expenses with that of other agents in the same income group, the average total agency expense as a percent of total agency income for the $43,000 to $57,999 gross income range was 36.1%. The average net income for Nationwide agents in 1980 ($49,340—36.1% ($17,812)) was therefore $31,528.

The court finds on the basis of this evidence that Nationwide agents are not a "select group" of "highly compensated employees" within the meaning of 29 U.S.C. § 1051(2). The court concludes that the Deferred Compensation Plan is subject to the nonforfeiture provisions of § 1053(a). Darden is therefore entitled to receive his accrued deferred compensation benefits when he attains the age of 60.

SO ORDERED this 30th day of June, 1989.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1623

ROBERT T. DARDEN,
Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
and NATIONWIDE LIFE INSURANCE COMPANY,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Fayetteville
Terrence W. Boyle, District Judge
(83-96-CIV-3)

Argued: December 3, 1985 Decided: July 15, 1986

Before MURNAGHAN, SPROUSE and SNEEDEN,* Circuit Judges.

Marion G. Follin, III (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellant; Walker Y. Worth, Jr. (Russ, Worth & Cheatwood on brief) and

* The Honorable Emory M. Sneeden resigned from the court before the case was decided. He did not participate in the decision.

Craig G. Dalton, Jr. (Moore, Ragsdale, Liggerr, Ray & Foley, P. A. on brief) for Appellees.

MURNAGHAN, Circuit Judge:

Robert Darden appeals from the decision of the United States District Court for the Eastern District of North Carolina granting summary judgment for defendant Nationwide Mutual Insurance Company on Darden's claim for retirement benefits on the basis of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*

I.

From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than through a fixed salary.

The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of the agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended

Earnings Plan, Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months.

The agency agreements also provided that Nationwide's obligation to pay benefits under the Agent's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a tweny-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden provided further that either party had the right to cancel the agreement at any time after written notice.

Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan.

The most recent statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664.00 in the Deferred Compensation Plan and $65,706.00 in the Extended Earnings Plan. Under the election which Darden had on file with Nationwide at the time of his termination, he was entitled to approximately $490.00 per month for the remainder of his life, to begin within sixty days after his termination, under the Extended Earnings Plan. He was also entitled to approximately $120.00 per month for the remainder of his life, to begin at age 50, under the Deferred Compensation Incentive Plan. At his termination in 1980, he was 46 years of age.

Darden filed the present action on November 8, 1983, seeking to benefit from the terms of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Under ERISA, an employee's right to receive retirement benefits from an employer-sponsored retirement plan must vest, thereby becoming nonforfeitable, after a period of time to be determined according to one of three alternative methods. 29 U.S.C. § 1053(a).[1] Darden based his claim to relief on § 502(a) of the Act, 29 U.S.C. § 1132(a), which provides that a participant in or a beneficiary of an employee retirement income security plan may bring a civil action to enforce the provisions of the Act and to recover benefits due to him. Darden accord-

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[1] Under the first method, the plan must accord an employee a non-forfeitable right to 100% of his accrued pension benefits upon completion of ten years of service with the employer. 29 U.S.C. § 1053(a)(2)(A). Under the second method, the plan must provide the employee with a nonforfeitable right to a percentage of accrued benefits increasing with each year of service, beginning with 25% of accrued benefits after five years' service and ending with 100% after fifteen years. 29 U.S.C. § 1053(a)(2)(B). Under the third method, the employee's nonforfeitable percentage of accrued benefits increases with respect to both the employee's years of service and his or her age. Fifty percent of the employee's accrued benefits must become nonforfeitable when the employee has completed at least five years of service and the sum of the employee's age and years of service equals or exceeds 45. One hundred percent must become nonforfeitable when the employee has worked for the employer for at least ten years and the sum of the employee's age and years of service equals or exceeds 55. 29 U.S.C. § 1053(a)(2)(C).

Under any of the three alternatives, the Agent's Security Compensation Plan for Darden had vested, immune from forfeiture, if Darden was an employee.

ingly sought to enforce the Act's nonforfeitability requirements and to recover the benefits claimed to be due to him under the provisions of Nationwide's Agent's Security Compensation Plan.

Following discovery, both parties moved for summary judgment. The matter was referred to a magistrate, who recommended that summary judgment be granted for Darden. The district court rejected the magistrate's recommendation and granted summary judgment for Nationwide on the ground that Darden did not qualify as an employee within the scope of ERISA and therefore had no enforceable rights against Nationwide derived from that Act. Darden now appeals from the district court's decision.

II.

To maintain an action based on § 502(a) of ERISA, 29 U.S.C. § 1132(a),[2] Darden must qualify as a "participant" in an employee benefit plan.[3] The Act defines a

[2] Section 502(a) of ERISA, 29 U.S.C. § 1132(a), provides in relevant part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

[3] While an action may also be brought by a "beneficiary," 29 U.S.C. § 1132(a)(1), (3), or by a "fiduciary," 29 U.S.C. § 1132(a)(3), Darden makes no claim to a right of action in either of those capacities. A "beneficiary," for the purposes of ERISA, is a

"participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . ." 29 U.S.C. § 1002(7). Thus, Darden's right to pursue an ERISA-based claim against Nationwide depends upon whether he may properly be treated as an "employee" for the purposes of ERISA, or whether he falls into the independent contractor category.

The statute itself provides little guidance concerning the interpretation to be given the term "employee" in the ERISA context. "Employee" is defined simply as "any individual employed by an employer." 29 U.S.C. § 1002(6). Perhaps as a result of this lack of explicit statutory guidance, the few courts that have considered the question have looked to definitions of the employer-employee relationship developed in other areas of law.

One such approach involves the application of the traditional common-law standard for indentifying the relationship of master and servant. *See Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson v. Central States Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).[4] The principal element of the common-law stan-

person other than one whose service resulted in the accrual of the benefits, but who is designated as the recipient of benefits accrued through the service of another. 29 U.S.C. § 1002(8). Darden does not claim to be the beneficiary of benefits earned by someone else. Nor is there any indication in the record that Darden had any fiduciary responsibilities with respect to the Nationwide plan.

[4] It is not clear, however, that either the Seventh or Eighth Circuit intended to apply the common-law test to the interpretation of the term "employee" as it is used in the statute itself. Rather, all three of the cases appear to have involved only claims that the plaintiffs were entitled to benefits under the terms of the particular pension plan alone, without raising an additional question as to the validity of the pension plan under ERISA. Accordingly, both courts

dard is the extent of one party's right to direct and control the performance of the other. *Short v. Central States Pension Fund*, 729 F.2d 567, 572 (8th Cir. 1984); *Restatement (Second) of Agency* § 220 (1957); *Prosser and Keeton on Torts*, § 70 at 501 (5th ed. 1984). Many factors are considered in determining whether there is such a right to control, including the degree of one party's supervision of the details of the other's work; whether the two parties are engaged in distinct businesses or occupations; who supplies the place and instrumentalities of the work; the duration of the relationship between the parties; the method of payment; and other factors.[5]

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interpreted the term "employee" as it was used in the pension plan document, not in the statute. That document, which was the same in all three cases—because all three cases involved the Central States Pension Fund—provided that its terms were to be construed according to Illinois law, and that the common-law definition of the master-servant relationship should control. Thus, in applying common-law principles, the Seventh and Eighth Circuits appear to have been doing no more than giving effect to the intention of the parties to that particular pension plan agreement without considering whether ERISA might preempt or override the intention of the parties.

[5] The District Court for the Western District of Oklahoma took a slightly different approach in *Soloway v. New York Life Insurance Co.*, No. 77-0849-D, slip. op. (W.D. Okla. 1978). Relying on cases which develop the definition of "employee" in the context of other federal statutes, such as the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, rather than on the common law, the district court adopted a six-factor test which is similar in application to the common-law standard. The six factors included: (1) the extent to which the services in question are an integral part of the "employer"'s business; (2) the amount of the "employee"'s investment in facilities and equipment; (3) the nature and degree of control retained or exercised by the "employer"; (4) the "employee"'s opportunities for profit or loss; (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and (6) the permanency and duration of the relationship. Having weighed the matter in that light, the Oklahoma district judge concluded, for the purposes of the case before the court, that the insurance agent concerned was not an employee for ERISA purposes.

Under such traditional common law principles, Darden most probably would not qualify as an employee. Darden was relatively free to run his business as he chose. Dardden was able to exercise his independent judgment as to the time, place and manner of soliciting and selling insurance and serving policy holders. He was able to hire and fire clerical employees without securing Nationwide's approval, though he could not on his own hire additional insurance agents. On the other hand, Nationwide monitored Darden's operations and imposed several restrictions on his activities. He was instructed not to provide price quotations over the telephone to customers. He was also directed to collect a full six months' premium for automobile insurance at the inception of the policy, and was not permitted to allow the customer to pay part of the premium after 45 days. He was required to ask questions of automobile insurance applicants in a manner in line with a certain Nationwide-mandated procedure, to set up a claims log file, to review his files and to contact policy holders 60 days before the renewal date of a policy, to have his secretaries attend training sessions sponsored by Nationwide, to inspect personally the automobiles of applicants for automobile insurance, and to meet personally with every youthful male applicant for automobile insurance. While Darden was not required to prepare regular reports for Nationwide concerning his activities, he was subject to unannounced audits by Nationwide's accountants. Nationwide encouraged Darden, but did not compel him, to attend training seminars offered by Nationwide.

Darden was compensated through commissions, rather than through a salary. He paid his business expenses out of his commissions, including office maintenance and utilities and the salaries of his clerical staff. Darden owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes. He did not, however, own his business in a complete sense, because he was not entitled to

sell the business as a going concern. Under the terms of the agency agreements between Darden and Nationwide, the good will and the value associated with the servicing of existing policies reverted to Nationwide upon the termination of the agency relationship. In their dealings with each other, Darden and Nationwide referred to their relationship as one between independent contractors. Darden was not entitled to receive certain benefits reserved for Nationwide "employees," such as life insurance, health insurance, and paid annual leave. Darden received his commissions without deduction by Nationwide for income taxes or other charges.

We conclude, however, that the common-law test for the relationship of master and servant is not the appropriate standard for application here. The Supreme Court has emphasized on two occasions that the definition of "employee" should be tailored to the purposes of the statute being construed. *United States v. Silk*, 331 U.S. 704, 713 (1947) (defining "employee" for the purposes of the Social Security Act); *NLRB v. Hearst Publications*, 322 U.S. 111, 120-29 (1944) (defining "employee" for the purposes of the National Labor Relations Act). In both cases, the Court rejected the argument that the term "employee" as used in federal statutes should be interpreted in accordance with the common-law standard. The Court pointed out that the common-law test, which emphasizes the elements of supervision and control, was developed for the purpose of determining whether the extent of one person's control over the actions of another was sufficient to justify the imposition of vicarious liability on the controlling person for the wrongful acts of the person subject to control. *Silk*, 331 U.S. at 713; *Hearst*, 322 U.S. at 129. Instead, the Court explained, the content of the term "employee" in the context of a particular federal statute is "to be construed 'in the light of the mischief to be corrected and the end to be attained.'" *Silk*, 331 U.S. at 713, *quoting Hearst*, 322 U.S.

at 124. In interpreting statutory language so as to define the class of persons protected by the statute, a court must take as its "primary consideration" whether the inclusion of the disputed category of persons would effectuate the "declared policy and purposes" of the statute. *Silk*, 331 U.S. at 713; *Hearst*, 322 U.S. at 131-32.

The purposes of ERISA are explicitly set forth in § 2 of the Act, 29 U.S.C. § 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits." Because employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual employees and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

This statement of congressional purpose provides us with useful guidance in fashioning a standard to be used in determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA. The protected class described in the statement of purpose encompasses, first of all, persons whose retirement benefits were "anticipated." In other words, the "employer" or sponsor of the pension plan must have taken some action that created a reasonable expectation on the "employees'" part that benefits would be paid to them in the future. Second, persons within the protected class must have relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service, and by foregoing other significant means of providing for their retirement. It is that category of persons—those for whom the forfeiture of accrued employee benefits results in financial hardship during retirement—that was the focus of congres-

sional concern. Finally, implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. Had they possessed such bargaining power, statutory reform would have been unnecessary.[6] Evidence of the extent of the "employer's" control may, of course, be relevant to a determination of relative bargaining power.

Viewed from that perspective, Darden's case appears substantially stronger. By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him.[7] There is also evidence in the record indicating Darden's reliance on that expectation. He remained with Nationwide for eighteen years—a period which exceeds the length of service prescribed by Congress for the vesting of benefits under any of the three methods described in § 1053(a). Moreover, Darden was obliged to forego at least one alternative method of providing for his retire-

[6] The importance of a disparity in economic bargaining power to a determination of employee status was recognized in *Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, No. 83-129-CIV-5, slip op. at 15-17 (E.D.N.C. 1984), where the district court held that certain insurance agents qualified as "employees" for the purposes of ERISA.

[7] Darden's expectations were limited, of course, by the agency agreement's provision, present from the outset, that accrued benefits would be forfeited if Darden were to compete with Nationwide following the termination of his agency relationship. However, it is precisely that sort of employer-imposed condition on the employee's anticipations that Congress intended to outlaw with the enactment of ERISA. Under ERISA, employee rights must vest after a statutorily defined period; they may no longer remain contingent on the employee's actions. Employers may not circumvent that congressional purpose by arguing that a disappointed beneficiary did not qualify as an employee because his or her expectations were limited by forfeitability provisions.

ment that would normally have been available to an independent contractor: because much of the value of a Nationwide agency reverted to Nationwide upon the agent's termination, Darden was not able to build up equity in his business which could eventually be transformed into cash through the sale of the business. On the other hand, there is no indication in the record as to whether Darden pursued other methods of providing for his retirement which would have significantly reduced his reliance on the Nationwide benefit plan. Nor is there any evidence as to whether a failure to make such alternative provisions would have been reasonable in light of the common practices of other Nationwide insurance agents. Finally, the evidence concerning the respective bargaining strength of the parties is incomplete.

It appears that the parties have oriented their factual presentations toward the common-law test of master and servant, a standard which we now reject in favor of one focusing on the objectives and purposes of ERISA. Applying the approach we now endorse, we are not satisfied that the facts have been sufficiently developed to insure ripeness for decision at the summary judgment stage. Further factual development relevant to the purposes of ERISA, either by additional materials submitted in support of a renewed motion for summary judgment, or by trial, would be appropriate. We conclude that the district court's focus of attention on the common law master/servant issue did not result in a decision properly attuned to the pertinent considerations.

III.

Nationwide further contends that, even if Darden is assumed to be an employee for the purposes of ERISA, the district court's judgment may, nevertheless, be upheld on other grounds. Nationwide points out that the nonforfeitability requirements of 29 U.S.C. § 1053(a) apply only to "pension plans" and not to other forms of employee

benefit plans. Thus, Nationwide's provision for forfeiture upon a terminated agent's entry into competition with Nationwide is invalid only if Nationwide's Agent's Security Compensation Plan qualified as a "pension plan" within the meaning of the Act. Nationwide advances two theories in support of its argument that its plan did not so qualify.

Nationwide argues, first, that its plan constituted a "severance pay plan." Regulations issued by the Secretary of Labor, pursuant to statutory authority under 29 U.S.C. § 1002(2)(B), provide that a severance pay plan does not qualify as a pension plan for purposes of ERISA if: (1) the severance payments are not contingent upon the employee's retirement; (2) the total amount of severance payment does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and (3) all such payments to any employee are completed within 24 months after the termination of the employee's service. 29 C.F.R. § 2510.3-2. Nationwide's Agent's Security Compensation Plan plainly fails to satisfy the third prong of that test. Under the terms of the plan, Darden was entitled to, and indeed did, elect to receive benefits in the form of a life annuity. Moreover, under the Deferred Compensation Incentive Credit portion of the plan, Darden's benefit payments would begin only when he reached the age of 50—four years after his termination at age 46. Thus, it is manifest that Nationwide's plan did not provide for the completion of payments to Darden within 24 months following his termination.

Nationwide also contends that its plan is not subject to the vesting and nonforfeitability requirements of § 1053(a) by virtue of § 1051(2), which exempts from those requirements any plan "which is unfunded and which is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of

management or highly compensated employees."[8] In the present posture of the case, however, whatever the ultimate disposition may be, the question is not suited for summary judgment disposition, because several disputed issues of fact remain.

First, the parties disagree as to whether Nationwide's plan is funded or unfunded, and both parties have produced evidence to support their respective positions. Nationwide relies on the affidavit of George W. Frink, Nationwide's Vice President for Marketing Services, who has stated that the plan is unfunded. Darden, on the contrary, points to the agents' benefit handbook prepared by Nationwide, which stated that the Deferred Compensation Incentive Credit portion of the plan was funded as benefits accrue, although the Extended Earnings portion of the plan would be funded only upon cancellation of the agent's contract. Darden also points to the deposition of Elton Parker, the personnel director of Nationwide's Raleigh office, who stated that both portions of the plan were funded.

The facts are also in dispute as to whether the Agents' Security Compensation Plan was limited to a "select group" of "highly compensated employees." The term "select group" seems to imply a small percentage of the total number. In *Belka v. Rowe Furniture Corp.*, 571 F. Supp. 1249, 1252 (D. Md. 1983), the district court held that a plan which covered only 4.6% of total employees was limited to a "select group." Here, the parties have presented no evidence as to the percentage of Nationwide's total employee complement who participated in the Agents' Security Compensation Plan.

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[8] We do not accept Darden's contention that our consideration of the argument is improper because the issue was not raised before the magistrate. The argument was sufficiently advanced when it was raised before the district court in Nationwide's Objection to the Magistrate's Memorandum and Recommendations.

There is also a dearth of evidence as to whether the insurance agents covered by the plan were "highly compensated" in relation to Nationwide's other employees. Nationwide asserts, but has not substantiated, that the average compensation of its agents in 1980 was $44,773, while the average compensation of "all Nationwide employees" in 1980 was $16,510. Even assuming the correctness of those figures, however, a lack of further clarification prevents their intelligent evaluation. We are not told, for example, whether the $16,510 figure is the average of all employees *including* the agents or *excluding* the agents. Nor are we told how the agents' compensation is calculated, or whether it is adjusted so as to be comparable to the compensation paid to salaried employees. Nationwide's comparison may be between apples and oranges. It is clear, then, that disposition by way of summary judgment of the question of exemption under § 1051(2) would be inappropriate.

IV.

We vacate, rather than reverse, the district court's decision, so that on remand the parties may have an opportunity to structure their factual and legal presentations concerning Darden's status as an employee within the meaning of ERISA in a manner consistent with the approach we have outlined above. Alternatively, or if Darden is found to qualify as an employee, the district court should allow the parites to present further evidence on the question whether Nationwide's plan constituted an unfunded plan for the compensation of a select group of highly compensated employees.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,
Plaintiff,

vs.

NATIONWIDE MUTUAL INS. CO., *et al.*,
Defendants.

ORDER

[Filed May 23, 1985]

This action comes before the court upon cross-motions for summary judgment filed by the parties and upon the memorandum and recommendation of the Honorable Charles K. McCotter, Jr., United States Magistrate entered in this action on March 8, 1985. The defendants have filed objections to the magistrate's memorandum and recommendation and this cause is now ready for an order of the court.

FACTS

Plaintiff Robert T. Darden is a former insurance agent for the defendant insurance companies. Darden seeks to recover certain monetary benefits which he alleges are due to him under the programs maintained by the defendant and known as "deferred compensation incentive credits" and "extended earnings." Darden maintains that the provisions of the Employment Retirement Income

Security Act (ERISA), 49 U.S.C. § 1001, *et seq.*, apply to these programs and that his interests in the programs were non-forfeitable. The defendants contend that ERISA does not apply to these programs because Darden was not an employee, but an independent contractor.

From 1962 until November 20, 1980, Darden was a non-salaried insurance agent for Nationwide. The relationship between the parties was governed by a series of written contracts called agent's agreements. The agent's agreement provided that the liability of Nationwide for benefits under the agent's security compensation plan would cease if (1) the agent engaged in the fire, casualty, life, or health insurance business within one year of the cancellation of the agent's agreement within twenty-five miles radius of the former business location, (2) the agent at any time after the cancellation of the agreement induced a policyholder of Nationwide to cancel or (3) the agent replaced any insurance contract in force with Nationwide or furnished the name of the policyholder to a competitor.

In October, 1980, Nationwide terminated Darden's agreement because he became a marginal agent and was causing the company to suffer losses. In December, 1980, Darden began an insurance business at the same location selling policies for Nationwide's competitors. Nationwide cancelled Darden's benefits under the agent's security compensation plan.

DISCUSSION

To prevail under an ERISA theory, the plaintiff must show that he was an employee of the defendants rather than an independent contractor. For the following reasons, the court finds that the plaintiff was not an employee.

The plaintiff maintained an office in Spring Lake, North Carolina, at his own expense. The plaintiff was free to

solicit insurance sales wherever, whenever, and from whomever he wished. The plaintiff was free to hire and fire his office help. The plaintiff paid his own business expenses. The plaintiff received compensation solely through commissions rather than as a salary from the defendants. The plaintiff was ineligible for such employee benefits as accident and health insurance, sick leave, vacation pay, jury duty pay, and employee pension or profit sharing plans. Nationwide withheld no taxes from the plaintiff's commissions. The plaintiff reported his own income, and paid taxes as an independent businessman. The plaintiff reported his commission income and business expenses on IRS forms prescribed for sole proprietorships. The plaintiff maintained an individual retirement account. Throughout all the agreements between the plaintiff and Nationwide, the plaintiff is listed as an independent contractor and not an employee. The plaintiff paid the fees for all his state agent's licenses. The plaintiff was free to incorporate his agency. He determined his own hours. Finally, it was primarily through the plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide.

The plaintiff alleges against this array of facts that the defendants had the right to control the plaintiff because they made suggestions in order to make the plaintiff's business more profitable. The defendant conducted seminars for the plaintiff and for his clerical employees to teach them how to do their jobs more efficiently. Neither the plaintiff nor his employees were required to attend these seminars, and the plaintiff was not required to incorporate the suggestions that the defendants made.

In *U.S. v. Silk*, 331 U.S. 704 (1947), the Supreme Court decided that truck drivers were not employees for purposes of the Social Security Act. The court considered the following factors: (1) degree of control over the workers; (2) the opportunity for the worker for profit

or loss from his own efforts; (3) the investment by the workers in equipment; (4) the permanency of the relationship; and (5) the skill required of the workers to carry out their duties. The Court found that the truckers were free to hire their own assistants, they were free to determine their own routes, they were compensated with a percentage of the traiffs charged by the company, their opportunity for profit or loss depended on their own efforts and initiative, and the contracts between the company and the truckers could be cancelled by either party.

The Supreme Court in *NLRB v. United Insurance Company*, 390 U.S. 254, 19 L.Ed.2d 1083, 88 S.Ct. 988 (1968) stated the correct method for determining whether a person was an employee or an independent contractor.

> In such a situation as this there can be no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in the light of the pertinent common law agency principles.

"The total factual context" of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee. *See Wardle v. Pension Fund*, 627 F.2d 820 (7th Cir. 1980) and *Carter v. Pension Plan*, 656 F.2d 575 (10th Cir. 1981).

Because this court determines that Darden was an independent contractor and not an employee of Nationwide, it need not reach the other issues discussed in the magistrate's memorandum and recommendation. The defendant's motion for summary judgment is ALLOWED this 22nd day of May, 1985.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-2759

ROBERT T. DARDEN,
Plaintiff-Appellee
v.
NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellants

No. 89-2760

ROBERT T. DARDEN,
Plaintiff-Appellant
v.
NATIONWIDE MUTUAL INSURANCE COMPANY;
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY;
NATIONWIDE LIFE INSURANCE COMPANY,
Defendants-Appellees

On Petition for Rehearing with
Suggestion for Rehearing In Banc

[Filed February 22, 1991]

The appellant/cross-appellee's petition for rehearing and suggestion for rehearing in banc were submitted to

this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Hall and Judge Murnaghan.

For the Court,
/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1623

ROBERT D. DARDEN,
Appellant,

versus

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Fayetteville
Terernce W. Boyle, District Judge

[Filed Aug. 28, 1986]

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Sprouse.

For the Court,
/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 88-4016

A.F. PLAZZO; PLAZZO INSURANCE SERVICES, INC.,
Plaintiffs-Appellees,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant-Appellant,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, *et al.*,
Defendants.

On Appeal from the United States District Court
for the Northern District of Ohio

Decided and Filed Dec. 22, 1989

Before: KEITH and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Nationwide Mutual Insurance Company appeals from the judgment of the district court holding that plaintiff-appellee, A.F. Plazzo, was an employee of Nationwide for the purposes of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (ERISA). In keeping with this court's recent decision in *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989), which held that a commissioned insurance agent was an independent

contractor, not an employee for ERISA purposes, we reverse the judgment of the district court.

FACTS

Between 1961 and 1983, A.F. Plazzo was an unsalaried insurance agent for Nationwide. Plazzo's relationship with Nationwide was governed by a series of agency agreements. Under the agreements, Plazzo was required to represent Nationwide exclusively. These agreements specifically stated that Plazzo was an independent contractor. As such, he was responsible for maintaining his own business, including providing his own office space and hiring his own employees. Nationwide paid Plazzo commission which was reported on IRS Form 1099 Self-Employment Statement. Plazzo prospered as a Nationwide agent. In 1980, he built his own office building and took his son into his business. In 1982, Plazzo formed a corporation, Plazzo Insurance Services, Inc. (PISI). As the principal for PISI, he arranged with Nationwide to terminate his agent's agreement in favor of a corporate agency agreement for PISI. In October 1983, Plazzo sued Nationwide in state court for the alleged breach of an oral contract to assign certain insurance policies to the Plazzo agency. Summary judgment was granted to Nationwide on this claim. In part due to this suit, Nationwide cancelled the agency agreement with PISI in December 1983.

Nationwide alleges that following cancellation of the agreement, the younger Plazzo, with his father's assistance, continued to sell insurance for other insurance companies from the same office they used while selling Nationwide insurance. In January 1984, PISI sent letters to many Nationwide policyholders previously serviced by the Plazzos, notifying them that PISI was an independent insurance agency and expressing a desire to retain their business. The Plazzos were very successful in switching Nationwide policyholders to their new lines of insurance.

The present dispute involves Plazzo's claim that Nationwide has withheld retirement benefits due him in violation of ERISA. Under the agency agreement, the Agent's Security Compensation Plan (ASCP) conditionally provided payments to agents following the cancellation of the agreement. The ASCP consisted of two parts, Extended Earnings and Deferred Compensation Incentive Credits (DCIC). Extended Earnings provided the agent with an amount equal to renewal commissions earned in the last twelve months of service upon his retirement, termination, disability, or death. Under DCIC, after the fifth year of service, the agent received credit annually for a percentage of earnings on renewals and new policies on cerain types of insurance. To receive the ASCP payments, however, the agent could not directly or indirectly engage in the insurance business within a 25-mile radius of his Nationwide location during the first year following cancellation of the agreement or directly or indirectly induce Nationwide policyholders to cancel or replace their coverage. Due to the Plazzos' sale of other insurance lines and their efforts to induce Nationwide policyholders to change their policies to these new lines, Nationwide determined that Plazzo had failed to meet the conditions for ASCP payments. Plazzo filed suit under § 502(a) of ERISA which provides, *inter alia*, that a participant in an employee retirement plan may bring a civil action to enforce his rights under the plan or recover benefits under the plan. 29 USC § 1132(a)(1)(B). Plazzo argued that under the vesting provisions of ERISA, Nationwide cannot enforce the conditions for ASCP payments against him. The district court ruled in Plazzo's favor, and Nationwide appealed.

ANALYSIS

ERISA's vesting provisions, 29 USC § 1053, are only applicable if: 1) Plazzo was an "employee" within the meaning of ERISA; 2) the ASCP is a "pension benefit

plan" within the meaning of ERISA; and 3) the ASCP is not a "top hat plan" exempted from ERISA's vesting requirements. *Wolcott v. Nationwide Mutual Insurance*, 884 F.2d 245, 250 (6th Cir. 1989); *see* 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(6), 1002(7), 1051(2). Unfortunately, ERISA's definition of "employee" is not enlightening. "Employee" is defined only as "any individual employed by an employer." 29 USC 1002(6). In *Wolcott, supra*, this court ruled that the common law rules of agency should be used in determining whether an individual is an employee for ERISA purposes. The criteria to be considered include:

> 1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the "employee" is engaged in his own business; 3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the "employee"; 5) whether the "employee" receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the "employee" stands to make a profit on the work of those working for him; 9) the amount of the "employee's" investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the "employee" is employed. (Citations omitted).

Wolcott, 884 F.2d at 251. *See* Restatement (Second) of Agency § 220(2) (1958). Although the district court applied similar common law criteria, in light of *Wolcott* we cannot agree with its finding that Plazzo was an employee of Nationwide for the purposes of ERISA.

The facts of *Wolcott* are very similar to this case. Wolcott was a commissioned agent with Nationwide for

twenty years. A dispute arose because Wolcott's wife and daughter sold competing lines of insurance from Wolcott's office. Nationwide cancelled Wolcott's agency agreement. After cancellation, Wolcott joined his wife and daughter in selling the other lines of insurance from the same office he used to sell Nationwide insurance. Due to these events, Nationwide refused to distribute Wolcott's ASCP payments because he had violated the noncompetition clause of the agency agreement. Wolcott sued alleging a violation of ERISA. The district court granted summary judgment for Wolcott. This court reversed, holding that Wolcott was an independent contractor rather than an employee of Nationwide, and therefore was not entitled to ERISA's vesting protections. In making its determination, this court noted that Wolcott owned his own office condominium, exercised managerial skill in his business, hired his own employees, paid most of his expenses, and maintained his own Keogh retirement plan. Additionally, Wolcott was paid commission, reported to the IRS that he was self-employed, and was not eligible for regular employee benefits such as vacation or sick leave.

The facts of the present case are virtually indistinguishable from *Wolcott*. Plazzo owned and maintained his own office building. He exercised managerial skill in operating his business. He hired, paid, and established a health insurance plan for his employees. He maintained bank accounts to pay the monthly expenses of operating his business. He was paid on a commission basis and reported to the IRS that he was self-employed. He maintained his own Keogh retirement plan. Thus, we conclude that Plazzo, like Wolcott, was an independent contractor, not an employee for the purposes of ERISA. Accordingly, the judgment of the district court is reversed.

ISSUED AS MANDATE: February 27, 1990
COSTS: None

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 87-2815-4A

JOE S. SCIARA,

vs. *Plaintiff*,

NATIONWIDE INSURANCE COMPANIES,
Defendant.

No. 88-2490-4A

CHARLES B. BUCKNER,

vs. *Plaintiff*,

NATIONWIDE INSURANCE COMPANIES,
Defendant.

ORDER ON PENDING MOTIONS FOR SUMMARY JUDGMENT

[Filed Mar. 30, 1990]

In these cases, Joe S. Sciara ("Sciara") and Charles B. Buckner ("Buckner") brought separate actions against their former employer Nationwide Insurance Companies ("Nationwide"). By an order dated December 13, 1988, the cases were consolidated for trial. Both plaintiffs have sought to recover certain pension benefits allegedly owed to them by Nationwide. Both plaintiffs request relief under the Employee Retirement Income Securty Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and under

breach of contract theories. Nationwide has counterclaimed against each plaintiff alleging that it was damaged by each plaintiff's breach of their employment contract. Presently before the Court are motions for summary judgment by Nationwide, (1) on the ERISA claims of both Buckner and Sciara, (2) on its counterclaim against both Buckner and Sciara, and (3) on Sciara's state law breach of contract claim.[1] Also pending is Buckner's motion to dismiss Nationwide's counterclaim. Those motions are addressed below.

Background

Both Sciara and Buckner were commissioned insurance agents for Nationwide. Each began work for the company in the early 1960's. Their relationships with Nationwide were governed by written contracts known as "Agents' Agreements" which were renewed and revised over the years. The last renewal was signed by the parties in January 1983. These Agents' Agreements included terms and conditions of an Agents Security Compensation Plan ("ASCP"). The ASCP consisted of two programs, the "Deferred Compensation Incentive Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Plan, Nationwide was to maintain a retirement account for Buckner and Sciara and annually credit to that account a sum based on each agent's service fee earnings from the insurance policies sold or renewed. Under the Extended Earnings Plan, Nationwide was to pay each agent, upon retirement, termination, or death a sum equal to his earnings from renewal fees over the previous twelve months.

A former agent was not entitled to the ASCP benefits unless the cancellation of his agreement was a "qualified

[1] This Court has previously dismissed the breach of contract claim by Buckner because it was barred by the statute of limitations. *See Buckner v. Nationwide Ins. Co.*, No. 88-2490 (W.D. Tenn. July 7, 1989) (Order on Motion to Dismiss).

cancellation," which was defined in the Agents' Agreement as follows:

> A qualified cancellation "is any cancellation of the agreement unless the agent has [prior to cancellation] induced or attempted to induce—either directly or indirectly—any policy holder to lapse, cancel, or replace any insurance in force with the companies" [Nationwide]. See Agents' Agreement paragraph 11(e).

Even if the cancellation of an Agent's Agreement was "qualified," Nationwide's obligation to pay the ASCP benefits would terminate if any of the following occurred:

> 1) The agent, after cancellation, engaged in competition with Nationwide within a twenty-five mile radius of his former business location prior to the lapse of one (1) year after the cancellation;
>
> 2) The agent at any time after the cancellation of the Agreement induced a Nationwide policy holder to lapse, cancel or replace a contract of insurance with Nationwide; or
>
> 3) The agent failed to return all materials and records to Nationwide within ten days after the cancellation.

The Agents' Agreements provided that either party had the right to cancel the agreement at any time after written notice. Buckner's contract was cancelled May 17, 1983, and Sciara's contract was cancelled June 2, 1983. Although the agreement could be cancelled without cause, Nationwide has contended in this suit, that both Buckner and Sciara were terminated because they sold insurance for other companies without express written approval by Nationwide.

After receiving notice of their termination, both plaintiffs made demands for their ASCP benefits. Nationwide refused to pay, asserting that the agents had forfeited

their ASCP benefits by engaging in competition with Nationwide within one year after the cancellation. *See* Agents' Agreement paragraph 11*f*(1). Sciara then filed suit in Tennessee state court in October 1984 against Nationwide, alleging breach of the Agent's Agreement. Sciara later amended his complaint to add a cause of action under ERISA. Sciara's action was removed to this Court in November 1987. Buckner waited until July 1988 to file suit against Nationwide. Like Sciara, he alleged that Nationwide had breached the Agent's Agreement and asserted an ERISA claim. As heretofore indicated, this Court dismissed Buckner's breach of contract claim because it was barred by the statute of limitations.

The ERISA Claims

Both Sciara and Buckner have sought relief pursuant to ERISA, 29 U.S.C. § 1001 *et seq.*, alleging that Nationwide may not enforce the conditions on the ASCP payments because they have "vested" under ERISA and thus are nonforfeitable. *See* 29 U.S.C. § 1053. The nonforfeiture provisions of 29 U.S.C. § 1053 are only applicable if (1) Sciara and Buckner are employees within the meaning of ERISA; (2) the ASCP is a "pension benefit plan" within the meaning of ERISA; and (3) the ASCP is not a "top hat plan," which is exempted from ERISA's vesting requirements. 29 U.S.C. §§ 1132(a), 1002(2)(a), 1002(b) and 1002(7); *see also Fraver v. North Carolina Farm Bureau Mutual Insurance Co.*, 801 F.2d 675, 676-78 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1375 (1987). The parties concede that the ASCP involved in the present case is a "pension benefit plan" under ERISA. However, Nationwide argues that Sciara and Buckner are not "participants in an employee benefit plan" because they are independent contractors rather than "employees" of Nationwide. *See* 29 U.S.C. §§ 1132(a), 1002(7), and 1002(6). The Court of Appeals for the Sixth Circuit has recently addressed the factors a court should consider

when deciding whether a party is an employee or independent contractor for ERISA purposes. In *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989), the court held that a commissioned insurance agent was an independent contractor rather than an employee under ERISA. The *Wolcott* court stated that the courts should look to common-law rules of agency to determine "employee" status. *Id.* at 251.

> The traditional common-law criteria that courts have employed include: (1) the degree of control and supervision over the manner in which the work is performed; (2) whether or not the "employee" is engaged in his own business; (3) the company's right to hire and discharge the persons doing the work; (4) the method of compensation to the "employee"; (5) whether the "employee" receives the same benefits as the company's regular employees; (6) who has control of the premises where the work is done; (7) how the parties structure their Social Security and income relations; (8) whether the "employee" stands to make a profit on the work of those working for him; (9) the amount of the "employee's" investment in the facilities and equipment; (10) the belief of the parties as to their business relationship; (11) the amount of skill required in the particular occupation; and (12) the duration of time for which the "employee" is employed.

Id.; *see also Holt v. Winspirsiger*, 811 F.2d 1532, 1539-40 (D.C. Cir. 1987) (citing Restatement (Second) of Agency § 220(2) (1958)).

Applying these factors to the present case, the Court finds that Sciara and Buckner are not "employees" within the meaning of ERISA and cannot invoke ERISA's nonforfeiture provisions. Both Sciara and Buckner had their own offices, paid their own expenses and insurance, and employed and supervised their own employees. These ac-

tions were not controlled by Nationwide. Likewise, Nationwide did not deduct Social Security or income taxes from their commissions. Moreover, the Agents' Agreements which governed their relationships with Nationwide stated that they were independent contractors. Therefore, Nationwide's motion for summary judgment on the ERISA claims in both cases is granted.

The Breach of Contract Claim of Sciara

Sciara's breach of contract claim involves two separate issues. First, whether Nationwide could terminate Sciara without breaching the Agents' Agreement and second, whether Nationwide breached the Agent's Agreement when it refused to pay Sciara his ASCP benefits. The first question is governed by the plain terms of the Agent's Agreement. Paragraph 9 states "that due to the personal nature of our [Nationwide's and Sciara's] relationship, you [Sciara] or the companies [Nationwide] have the right to cancel this agreement at any time after written notice has been delivered to the other or mailed to the other's last known address." All Nationwide was required to do in order to terminate Sciara was send him written notice of that cancellation, which was done. No matter what reasons Nationwide may have had to cancelling Sciara's agreement, it did not breach the agreement by terminating it.

However, the question of whether Nationwide could withhold Sciara's ASCP benefits after cancellation is much more involved. In order to have a right to the ASCP benefits, Sciara's cancellation had to have been a "qualified cancellation." Even if Sciara "qualified" for the ASCP benefits, Nationwide's obligation to pay them could still be terminated if Sciara violated either of paragraph 11(f)'s post-cancellation restrictions.

When Sciara made demand for the ASCP benefits, Nationwide refused because it asserted that Sciara's cancellation was not qualified and that he had violated paragraph 11(f)(1) of the Agent's Agreement by competing with Nationwide for customers prior to the lapse of one year. Nationwide's motion for summary judgment reiterates those two arguments.

Sciara's filed deposition contains an admission by him that he switched Nationwide's former policy holders to other companies in the three months prior to the cancellation of his agreement. This action would prevent the cancellation from being a "qualified cancellation" as defined in paragraph 11(e) of the Agent's Agreement. Furthermore, it appears that Sciara violated paragraph 11(f)'s post-cancellation restrictions. Sciara's deposition also contains an admission that in the first six months after his cancellation, his clientele was 80% ex-Nationwide policy holders. Also, he admitted that he moved to a new office within four miles of his previous business. These actions clearly violate paragraph 11(f)(1)'s restrictions on competition within one year after cancellation.

In response, Sciara argues that paragraph 11(f)(1)'s "covenant not to compete" is void for lack of consideration and contrary to Tennessee public policy. Therefore he posits that it should not be enforced to deny him the ASCP benefits.

Although the record suggests that Sciara did not qualify for the ASCP benefits, this Court finds that even if he had qualified, Nationwide was not obligated to pay the ASCP benefits because Sciara violated a "covenant not to compete" which neither lacks consideration nor is void against public policy.

The covenant not to compete in the present case was a part of the original Agent's Agreement, which was signed by the parties in a "bargained for exchange." *See Central Adjustment Bureau v. Ingram*, 678 S.W.2d 28 (Tenn. 1984). In consideration for Sciara's not competing with Nationwide after cancellation, Nationwide agreed

to pay him ASCP benefits. This is sufficient consideration to support the covenant. *Id.* Also under *Ingram*, it appears that Sciara's continued employment from the January signing until June would be sufficient consideration to support the covenant. *See also Ramsey v. Mutual Supply Company*, 58 Tenn. App. 164, 427 S.W.2d 849 (1968).

As to the question of whether the "covenant not to compete" violates Tennessee public policy, this Court concludes that it does not. As a general rule, restrictive covenants in employment contracts will be enforced if they are reasonable under the particular circumstances. *See Allright Auto Parts, Inc. v. Berry*, 219 Tenn. 280, 409 S.W.2d 361 (1966). Reasonableness depends on the time and territorial limits involved. "The limits must be no greater than is necessary to protect the business interests of the employer." *Id.* at 363. In the present case, the limits on time and territory are reasonable.

Therefore because the Court finds that paragraph 11 (f) (1)'s covenant not to compete is valid and enforceable, and plaintiff has admittedly violated the covenant, Nationwide was not required to pay Sciara the ASCP benefits. Nationwide's motion for summary judgment on Sciara's breach of contract claim is hereby granted.

Nationwide's Counterclaims

Nationwide has moved for summary judgment on its counterclaims which allege that both Buckner and Sciara breached the Agents' Agreements by writing insurance for other companies. Buckner has responded to Nationwide's motion with a motion to dismiss the counterclaim against him. Buckner's motion is hereby granted. This Court's July 7, 1989 order concluded that Buckner's breach of contract claims were barred by the statute of limitations. Nationwide's counterclaim against Buckner fails for the same reason.

Sciara argues that Nationwide should be estopped from enforcing the exclusive representation provision of the contract, because it had allowed agents to write insurance for other companies without obtaining Nationwide's consent. The record supports Sciara's argument. Nationwide had routinely allowed Sciara to write insurance for other companies, and it would be inequitable to allow Nationwide to invoke this provision in a damage suit when it had routinely allowed noncompliance by its agents. Therefore the Court concludes that Nationwide is estopped from enforcing the exclusive representation clause, and its motion for summary judgment is denied.

Conclusion

Nationwide's motion for summary judgment on the ERISA claims by Buckner and Sciara is granted. The clerk is instructed to enter a judgment in favor of Nationwide on the ERISA claims in both cases. Nationwide's motion for summary judgment on Sciara's breach of contract claim is granted. The clerk is instructed to enter a judgment in favor of Nationwide on Sciara's breach of contract claim. Nationwide's motion for summary judgment on its counterclaims against Buckner and Sciara is denied. Buckner's motion to dismiss Nationwide's counterclaim is granted. The clerk is instructed to enter a judgment in favor of Buckner on Nationwide's counterclaim. The Court, sua sponte, dismisses Nationwide's counterclaim against Sciara. The clerk is instructed to enter a judgment in favor of Sciara on Nationwide's counterclaim. All issues having been resolved, the clerk is instructed to enter Final Judgments dismissing all claims and counterclaims in both cases.

IT IS SO ORDERED.

ENTER: This 30th day of March, 1990.

/s/ Robert M. McRae
ROBERT M. MCRAE
Senior United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil N-84-503(JAC)

JONATHAN HARLOW, *et al.*,
Plaintiffs,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, *et al.*,
Defendants.

June 19, 1987
New Haven, Connecticut

Before: HON. JOSE A. CABRANES, U.S.D.J.

RULING OF THE COURT

Appearances:

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THE COURT: Upon review of the entire record of this case, including the facts as previously stated and clarified, as well as the arguments of counsel here today, I am prepared to rule on the pending motions.

Summary judgment "is properly regarded, not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2555 (1986). In order to grant a motion for summary judgment, the court must find that there is no "genuine issue of material fact" and that "the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

In determining whether there is a material issue of fact, the court must "resolve all ambiguities and draw all inferences against the moving party." Schwabenbauer v. Board of Education, 667 F.2d 305, 313 (2d Circuit 1981). However, the party opposing summary judgment "may not rest upon mere conclusory allegations or denials as a vehicle for obtaining a trial," but instead "must bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." Quinn v. Syracuse Model Neighborhood Corporation, 613 F.2d 438, 445 (2d Circuit 1980), quoting SEC v. Research Automation Corporation, 585 F.2d 31, 33 (2d Circuit 1978).

At argument here today, plaintiff acknowledged that he is not opposing defendants' motion for summary judgment directed at plaintiff's wrongful termination claim, Count One of the complaint, and this court has already granted defendant's motion for summary judgment as to that count.

In support of his contention that he was an "employee" for ERISA purposes, plaintiff urges that the court adopt the test for that status adopted by the Court of Appeals for the Fourth Circuit in Darden v. Nationwide Mutual Insurance Co., 796 F.2d 701 (4th Circuit 1986). De-

fendant Nationwide counters that the Darden court erred in its analysis by only considering legislative purpose in arriving at its standard. In its place, Nationwide argues for a "hybrid test" that takes into account the economic realities that created the need for remedial legislation, but also considers traditional common law principles definding the employer-employee relationship. Nationwide contends that a such a hybrid test more accurately reflects Supreme Court precedent, congressional intent, and the actual practice of the various courts of appeals. Plaintiff's counsel acknowledged at argument here today that under the "hybrid" test plaintiff would not be considered an "employee."

This court agrees that a "hybrid" test is more appropriate in the circumstances presented by this case, but the question remains as to the precise version of the "hybrid test" to be applied under ERISA.

Although there appears to be no rule precisely on point in this circuit, our Court of Appeals has previously relied upon Supreme Court precedent to supplement the traditional common law test for determining whether a person is an "employee" under other federal legislation and has also underscored what it considers to be the remedial purposes of ERISA. In Avis Rent A Car System, Inc. v. United States, 503 F.2d 423, 428-29 (2d Circuit 1974), the Court of Appeals enumerated seven factors that can be considered to determine whether a person is an "employee" or an "independent contractor":

1. Control of the manner in which the service is performed.
2. The presence or absence of a substantial investment in tools or equipment.
3. Whether the person performing a service undertakes a substantial cost, such as hiring his own laborers.
4. If a person may increase his profit by exercising managerial skill.
5. If the service rendered requires special skill.

6. Whether the relationship between the person rendering the service and the person receiving the service is permanent.
7. Whether the person works in the course of the other person's business rather than in an ancillary capacity.

See also Cohen v. Martin's, 537 F. Supp. 766, 773 (S.D.N.Y. 1982) (considering five factors under ERISA: (1) degree of control and supervision; (2) the existence and nature of remuneration; (3) the permanency of the relationship; (4) whether the services were rendered in the normal course of business; and (5) conduct on the part of the parties evidencing an employment relationship.)

Although it is possible to employ even a greater number of factors and subfactors, see for example Garrett v. Phillips Mills, Inc., 721 F.2d 979, 982 (4th Circuit 1983), this court concludes that the Avis factors, considered in conjunction with ERISA's remedial purposes, provide an appropriate and ample standard for the determination of employee status under ERISA.

In evaluating ERISA's remedial purposes, the Darden court emphasized Congress's intent that the important reliance interests in retirement benefits of employees who lacked bargaining power be protected from the harmful effects of mismanaged or underfunded pension plans. While this characterization of ERISA is accurate, our Court of Appeals has taken what, in the context of the present case, may be considered a narrower view. Reviewing the history of ERISA, our Court of Appeals has noted that Title I was designed to protect workers in "traditional employer-employee relationships," who rely upon collective bargaining agreements to protect their pension benefits. Schwartz v. Gordon, 761 F.2d 864, 868 (2d Circuit 1985). Such vulnerable employees are to be given the protection of ERISA's pension provisions, while presumably more sophisticated self-employed individuals have available other means of protecting their retirement income. Id.

Given the strictures of Schwartz v. Gordon, it appears appropriate first to apply the seven Avis factors to decide whether Mr. Harlow more closely resembles a "traditional employee" or a "self-employed individual" and then to reevaluate this conclusion in light of ERISA's remedial purposes to determine whether he should be considered an "employee" for ERISA purposes.

Turning first to control of the manner in which the service is performed: Nationwide places some restrictions upon how their agents do business, but it is clear from the record that Mr. Harlow controlled much, if not all, of the manner in which he conducted his business. On balance, this factor favors a finding of independent contractor status.

Mr. Harlow had also made a substantial investment in the business, so the second factor also favors a finding of independent contractor status.

Mr. Harlow also hired his own employees, so the third factor also favors a finding that he was an independent contractor.

The fourth factor, whether a person may increase his profit by exercising managerial skill; clearly favors a finding of independent contractor status.

The fifth factor, the requirement of a special skill, also tends toward a finding of independent contractor status.

The sixth factor, the permanency of the relationship, is somewhat ambiguous. The relationship here was temporary in form, with periodical renewals, but indefinite (if not permanent) in practice, as Mr. Harlow's history with Nationwide and that of his father before him reveals.

Finally, Mr. Harlow worked in the ordinary course of Nationwide's business, so this factor favors a finding of employee status.

In sum, an examination of these factors without any direct reference to ERISA leads to the conclusion that Mr. Harlow should be considered an independent contractor rather than an employee.

A consideration of these facts in light of ERISA's remedial purposes does not change this conclusion. While Nationwide appears to possess superior bargaining power, Mr. Harlow does not appear to be in the class of vulnerable individuals that our Court of Appeals has indicated are the particular object of Congressional solicitude in ERISA. Mr. Harlow did not rely on others to protect his interests, but, rather, personally entered into an arrangement which explicitly defined his status as that of an independent contractor. While this sort of declaration of legal status in a contract is not binding on this court, the consistency of this particular declaration with the conclusion drawn from an examination of the seven Avis factors reaffirms that Mr. Harlow should not be surprised to find himself treated as a self-employed individual both by Nationwide and by the law. In other words, neither the economic reality of his situation nor the characteristics of his relationship with Nationwide support the contention that Mr. Harlow was an "employee" for ERISA purposes.

Accordingly, Nationwide's motion to dismiss Mr. Harlow's ERISA claim in Count Two of his amended complaint is granted, while plaintiff's motion for summary judgment as to the ERISA count is denied.

However, the finding that Mr. Harlow is not an employee for ERISA purposes does not end the inquiry as to the remaining claims in Count Two of plaintiff's complaint. Plaintiff also argues that the noncompetition provisions of his agreement with Nationwide are void as against public policy under Connecticut law. Nationwide argues that because plaintiff has continued to abide by these provisions and to accept his deferred compensation, he lacks standing to challenge the validity of these provisions. Nationwide also argues that the noncompetition clauses are valid under Connecticut law.

Plaintiff does have standing to seek a declaratory judgment. Plaintiff has neither received all the funds due him under his agreement with Nationwide, nor is it entirely

clear that he will not be liable for the return of those funds were he to violate the provisions of the agreement at any time during his life.

Plaintiff's claim that the agreement violates public policy presents issues for resolution that are sharp and clear; no additional clarity is to be gained by waiting for an actual violation before addressing these issues. "Where a real, substantial, and existing controversy between the parties to a contract exists, a party may not be compelled to breach the contract in order to determine the consequence of the breach, and a declaratory judgment is a proper vehicle for relief." Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1310-11 (E.D. Louisiana 1975) (citations omitted). Where a promisor seeks to have a covenant declared illegal as violative of public policy, a declaratory judgment action is available. Beit v. Beit, 135 Conn. 195, 201, 63 A.2d 161, 164 (1948).

In order to be valid under Connecticut law, a restraint on competition must be reasonable. To be reasonable "the restraint must be limited in its operation with respect to time and place and afford no more than a fair and just protection to the interest of the party in whose favor it is to operate, without unduly interfering with the public interest." Eldia, Inc. v. Harmor Realty Corporation, 177 Conn. 218, 226, 413 A.2d 1226, 1230 (1979) (citations omitted); compare Scott v. General Iron & Welding Co., 171 Conn. 132, 137, 368 A.2d 111, 114 (1976) (stating that such a restriction must be partial and restricted in its operation in respect "*either to time or place*" (emphasis added)).

Furthermore, even if a contract restraining competition is found to be valid, provisions providing for a penalty for the violation of the restraint, rather than for liquidated damages, will not be enforced. "The designation of a sum as liquidated damages does not necessarily make it such rather than a penalty. If the provision was inserted for the purpose of deterring the defendant from breaching his contract and of penalizing him for doing so,

instead of specifying a sum which the parties in good faith agreed upon as representing the damages which would ensue from a breach, it is to be regarded as imposing a penalty." May v. Young, 125 Conn. 1, 8-9, 2 A.2d 385, 388-89 (1938). See also Lipinski v. Columbus Plaza, Inc., 4 Conn. Cir. 24, 225 A.2d 36, 40 (Conn. Cir. Ct. Appellate Division 1966) ("Forfeitures are not favored. Where the contract provides for a penalty for nonperformance, as distinguished from liquidated damages fixing fair compensation to the injured party for the breach, it will not be enforced.").

As is indicated in the record, insurance policies are generally written for a period of one year. In the present case, the agreement forbids the plaintiff from engaging in the insurance business at all for one year within a twenty-five mile radius of his former agency. This restriction, limited both in time and space, reasonably serves the objective of protecting Nationwide's interests in its present customers. However, the second noncompetition provision of the agreement absolutely forbids Mr. Harlow from soliciting any of his Nationwide customers without any limitation whatsoever as to duration. While this provision does not absolutely prohibit Mr. Harlow from soliciting people who are not Nationwide policyholders, it contains no limit whatsoever as to time and goes beyond what is necessary to protect the company's interest in its business.

Accordingly, the provision absolutely prohibiting the solicitation of Nationwide's customers without any time limit violates public policy under Connecticut law, and is therefore void.

The question remains whether the void provision is severable or may be reformed. Plaintiff contends that it cannot, relying on Beit v. Beit, supra, 135 Conn. 195, 63 A.2d 161 (1948). However, plaintiff reads Beit v. Beit too broadly, and the rule appears to require an inquiry into the intent of the parties. Id., 135 Conn. at 204, 63 A.2d at 165. In the instant case, where there are two

distinct covenants, one reasonable, and one not, there is no impediment to divisibility. Id.

Accordingly, the provision barring Mr. Harlow from the insurance business for one year within twenty-five miles of his old agency may be enforced. At the same time, however, there is no basis by which the court can discern the parties' intent as to the proper durational limit to the prohibition against soliciting former Nationwide employees. Accordingly, under the rule of Beit v. Beit, this court cannot reform this provision and must therefore strike it in its entirety.

Since it has been more than one year since Mr. Harlow's agency has been terminated, and Mr. Harlow has not violated either of the restrictive covenants in his agreement with Nationwide, the court need not decide whether the forfeiture provision for the violation of the restriction the court has found reasonable is unenforceable as a penalty.

Plaintiff's motion for summary judgment is granted in part, and denied in part. The provision absolutely barring him from soliciting Nationwide's customers is void and unenforceable, and cannot be reformed. Nationwide shall continue to pay Mr. Harlow his deferred compensation as required in their agreement.

In sum, defendants' motion to dismiss plaintiff's ERISA claim in Count Two is granted. Plaintiff's motion for summary judgment as to the claim in Count Two that the noncompetition provisions of the agreement are void as violative of Connecticut public policy is granted in part and denied in part.

Inasmuch as the rulings here today have disposed of all counts of the complaint, judgment shall enter in accordance with this ruling.

It is so ordered.

MS. FREEMAN: Thank you, your Honor.

MR. ECKENRODE: Thank you, your Honor.

* * * *

FILED
JUN 21 1991
OFFICE OF THE CLERK

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No. 90-1802

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Was Robert T. Darden an employee of Nationwide under the Employee Retirement Income Security Act of 1974, as amended?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1802

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

OPINIONS BELOW

The Memorandum and Recommendation of United States Magistrate filed on March 8, 1985, is reprinted in Respondent's Appendix 1a. The initial unreported decision of the United States District Court for the

Eastern District of North Carolina in this matter was issued on May 23, 1985, and is reprinted in the Petitioners' Appendix ("Pet. App.") at 47a. The decision of the Fourth Circuit vacating and remanding the initial decision is reprinted in the Petitioners' Appendix at 32a and reported at 796 F.2d 701 (1986) ("Darden I"). The order of the Fourth Circuit denying rehearing with respect to Darden I is reprinted in the Petitioners' Appendix at 53a. The unreported Order of the District Court filed on June 22, 1988, finding that the Extended Earnings part of the Agent's Security Compenstaion Plan was not an employee pension benefit plan under ERISA is reprinted in Respondent's Appendix 50a. The Memorandum Opinion of the District Court on remand is reprinted in the Petitioners' Appendix at 13a and reported

at 717 F.Supp. 388 (1989). The second opinion of the Fourth Circuit, dated January 7, 1991, is reprinted in the Petitioners' Appendix at 1a and reported at 922 F.2d 203 ("Darden II"). The order of the Fourth Circuit denying rehearing with respect to Darden II is reprinted in the Petitioners' Appendix at 51a.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. Sec. 1254(1) (1988). The decision of the Fourth Circuit in Darden II was issued on January 7, 1991. Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc on January 18, 1991, which was denied on February 22, 1991. Petitioners filed a Writ for Certiorari on May 22, 1991, which

was received by the respondent on May 23, 1991.

STATEMENT OF THE CASE

The plaintiff brought this action pursuant to Sec. 502(a) of the Employee Retirement Income Security Act of 1974, as Amended, 29 U.S.C. Sec. 1132(a) ("ERISA") on November 8, 1983, seeking benefits due him under the Nationwide Agent's Security Compensation Plan maintained by Nationwide for its insurance agents. Following discovery, both parties filed motions for summary judgment. The matter was referred to United States Magistrate Charles K. McCotter, Jr. Following a hearing, the Magistrate in a Memorandum and Recommendation filed on March 8, 1985, (Respondent's Appendix 1a) recommended that summary judgment be granted to Darden. The Magistrate found that Darden was an

employee of Nationwide under ERISA and that the Agent's Security Compensation Plan was an employee pension benefit plan under ERISA. The District Court rejected the Magistrate's recommendation and granted summary judgment for Nationwide holding that Darden was not an employee of Nationwide under ERISA.

On appeal by Darden, the Fourth Circuit in Darden v. Nationwide, 796 F.2d 701 (1986) ("Darden I") held that the District Court had erred in applying the common law definition of employee and remanded the case to the District Court to apply the standard based on the legislative purposes of ERISA as declared by Congress. (Pet. App. 32a). The parties then conducted additional discovery and filed cross-motions for summary judgment. The District Court rejected both parties' motions for

summary judgment in an order filed on June 22, 1988, but the court did find that the Extended Earnings part of the Agent's Security Compensation Plan was not an employee pension benefit plan under ERISA (Respondent's Appendix 54a).

Following a two day bench trial, the District Court entered a Memorandum Opinion on July 5, 1989. The District Court found that Darden was an employee of Nationwide under ERISA applying the standard set forth by the Fourth Circuit in Darden I. Darden v. Nationwide, 717 F.Supp. 386 (1989)(Pet. App. 13a). The Court further found that the Deferred Compensation portion of the Agent's Security Compensation Plan was an employee pension plan under ERISA but that the Extended Earnings portion was not. Nationwide appealed to the Fourth Circuit and Darden cross appealed the District

Court's holding that the Extended Earnings portion of the plan was not a pension plan under ERISA. The Fourth Circuit affirmed the District Court. 922 F.2d 203 ("Darden II"). (Pet. App. 1a).

The facts of the case were summarized by the Fourth Circuit as follows:

> From 1962 until November 1980, Darden acted as an insurance agent for Nationwide Insurance Company in Fayetteville, North Carolina. During that period, Darden represented Nationwide exclusively. While Darden enjoyed a substantial degree of freedom to operate his agency as he chose, his freedom was limited by a number of requirements imposed by Nationwide. Darden was compensated through commissions, rather than a fixed salary.
>
> The relationship between Darden and Nationwide was governed by a series of eight successive agency contracts. Each of these agency contracts provided for Darden's participation in a retirement and deferred compensation plan for insurance agents referred to as the "Agent's Security Compensation Plan." The Agent's Security Compensation Plan consisted of two programs known as the "Deferred

Compensation Incentive Credit Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months. The agency agreements also provided that Nationwide's obligation to pay benefits under the Agent's Security Compensation Plan would terminate if a former agent engaged in the fire, casualty, health, or life insurance business, in competition with Nationwide, within one year of the cancellation of the agent's agreement with Nationwide and within a twenty-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of his agency agreement with Nationwide, induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agency agreements between Nationwide and Darden provided further that either party had the right to cancel the

agreement at any time after written notice.

Nationwide exercised its right to terminate the agreement on November 20, 1980. One month following the termination of the agreement, Darden opened a new business as an independent insurance agent, representing various competitors of Nationwide. He operated the new business at the same location he had previously used as a Nationwide agent. Nationwide then notified Darden that it would not pay him any of the benefits to which he otherwise would have been entitled under the Agent's Security Compensation Plan. 796 F.2d at 702-703.

Under ERISA, benefits under the employee pension plan are nonforfeitable once they are vested. 29 U.S.C. Sec. 1053(a). However, only employees are covered under ERISA. The statute defines an employee as "any individual employed by an employer." 29 U.S.C. Sec. 1002(6).

In Darden I, 796 F.2d at 706-07 the Fourth Circuit set forth a three-part test for determining whether an individual is an

employee under ERISA. To qualify as an employee under ERISA, one must show: (1) that he had a reasonable expectation that he would receive the benefits, (2) that he relied on this expectation, and (3) that he lacked the economic bargaining power to contract out of the forfeiture provisions.

In its Memorandum Opinion, the District Court on remand found that the Fourth Circuit in Darden I found that the first part of the test had been satisfied: "By establishing a comprehensive retirement benefits program for its insurance agents, Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." 796 F.2d at 707. The Court found that the second prong of the three-part test had been satisfied by Darden as he relied on the expectation of retirement benefits by remaining a

Nationwide agent for a substantial period of time and by foregoing other significant means for providing for his retirement. The District Court also found that Darden had satisfied the third factor by finding that Darden, and Nationwide agents as a group, lacked sufficient economic bargaining power to obtain a contractual right to nonforfeitable retirement benefits from Nationwide. The District Court then concluded that Darden was an employee of Nationwide within the meaning of ERISA, 29 U.S.C. Sec. 1002(6).

Nationwide in its Question Presented and its Statement of the Case states that this case involves insurance agents acting in a traditional independent contractor capacity. This could be misleading. Independent insurance agents represent several insurance carriers and can sell

their business when they retire. Darden was a "captive" insurance agent selling exclusively for Nationwide and could not sell the business when he retired since it belonged to Nationwide. See Darden I, 796 F.2d at 707.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals correctly interpreted the term "employee" under ERISA by following prior decisions of this Court. The Petition for Writ of Certiorari should be denied.

ARGUMENT FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Court denied a petition for writ of certiorari during this term seeking review of the identical issue sought to be raised by the petitioners. Plazzo v. Nationwide Insurance Company, No. 89-1499 (October 29, 1990). In Plazzo v. Nationwide Mutual Insurance Company, No. 88-4016 (6th Cir.

December 22, 1989), the Sixth Circuit held that the Nationwide agent was not an employee under ERISA applying the common-law standard. Pet. App. 54a-58a. At that time the same conflict between the circuit courts existed then as does now as described by the petitioners in their Petition for Writ of Certiorari. The Court, in the exercise of its discretion, denied Plazzo's Petition for Writ of Certiorari and it should do the same with respect to Nationwide's Petition for Writ of Certiorari in this case.

In United States v. Silk, 331 U.S. 704 (1947), this Court held that the terms "employment" and "employee" in the Social Security Act are to "be construed to accomplish the purposes of the legislation." 331 U.S. at 712. The court pointed out that constricted interpretation

of the terms would "invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." Id. In Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), this Court looked to the underlying economic realities in determining who was an employee under the Fair Labor Standards Act of 1938, 29 U.S.C. Sec. 201 et seq. In Goldberg v. Whitaker House Coop., 366 U.S. 28 (1961), the court affirmed the decisions in United States v. Silk, supra, and Rutherford Food Corp. v. McComb, supra holding that the test of employment under the Fair Labor Standards Act should be economic reality rather than technical concepts. The Fourth Circuit adhered to these cases in interpreting the employment relationship under OSHA 29 U.S.C. Sec. 651 et seq. in Brennan v. Gilles &

Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974).

The Fourth Circuit in Darden II relied on the holding of this Court in NLRB v. Hearst Publications, 322 U.S. 111 (1944), that "whether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." 322 U.S. at 124. This Court pointed out in NLRB v. United Ins. Co., 390 U.S. 254, that Congress amended the definition of employee contained in the National Labor Relations Act, 29 U.S.C. 151 et seq. to require the use of general agency principles in defining the term "employee." Congress chose not to define the term "employee" in ERISA. The Fourth Circuit was correct in relying on prior decisions of this Court in considering the purposes of ERISA in

defining the term "employee." In United States v. Silk, supra, this Court warned that constricted interpretation of the term "employee" in social legislation would defeat the purposes of the Act. The United States in its amicus curiae brief filed with respect to the petition for writ of certiorari in Plazzo v. Nationwide argued that courts utilizing the common law approach may be applying an unduly restrictive approach and ignoring this Court's decision involving remedial social legislation, Rutherford Food, Silk and Bartels v. Birmingham, 332 U.S. 126 (1947).

The Fourth Circuit's standards set forth in Darden I and Darden II represent the correct balance between the common law approach and the purposes of ERISA in defining the term "employee." Darden was an employee of Nationwide under ERISA

regardless of whether you use the approach of the Fourth Circuit in Darden I or the approach used by the United States Magistrate in his Memorandum and Recommendations in which he found that Darden was an employee under ERISA. Darden contends that he was an employee of Nationwide regardless of which test is used.

CONCLUSION

This Court should allow further development of the law in this area by the lower courts and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,)
)
Plaintiff)
) MEMORANDUM
v.)
) and
NATIONWIDE MUTUAL)
INSURANCE COMPANY,) RECOMMENDATION
NATIONWIDE MUTUAL FIRE)
INSURANCE COMPANY and)
NATIONWIDE LIFE)
INSURANCE COMPANY,)
)
Defendants)

[Filed March 8, 1985]

The plaintiff, Robert T. Darden, is a former insurance agent for the defendant insurance companies, Nationwide. Darden seeks to recover of Nationwide certain monetary benefits which he alleges are due him under programs maintained by the defendant and known as "Deferred

Compensation Incentive Credits" and "Extended Earnings." Nationwide has refused such payments on the grounds that Darden violated a non-competition covenant in his Agent's Agreement, thereby triggering a forfeiture provision in said contract. Darden maintains that the provisions of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1001, et seq., were applicable to this program and that his interest therein were non-forfeitable. Nationwide contends that the plans were not controlled by ERISA and, even if they were, Darden's relationship to Nationwide was that of an independent contractor to which ERISA did not apply. The parties have filed cross-motions for summary judgment. This matter has been referred to this Court for ruling pursuant to 28 U.S.C. Sec. 636(b)(1)(B).

After considering the record herein and arguments of counsel, the Court makes the following findings and recommendations.

A. Proposed Findings of Fact

1. From approximately 1962 until November 20, 1980, Darden was a non-salaried insurance agent for Nationwide. The relationship between the parties was governed by a series of written contracts called Agent's Agreements. The last agreement became effective on January 1, 1977, and remained in force until November 20, 1980, the date on which Nationwide terminated said contract under a termination provision contained therein. The Agent's Agreement provided for a program referred to as the Agent's Security Compensation. This program consisted of two plans known as "Deferred Compensation Incentive Credits" and "Extended Earnings,"

under which Darden might receive certain future monetary payments in accordance with one of several available schedules.

2. Under the Deferred Compensation Incentive Credit Plan, Nationwide annually credited to an account maintained for Darden a sum based on Darden's original and renewal service fee earnings as an insurance agent. The Extended Earnings Plan provided for payment by Nationwide to Darden of a sum of money equal to the prior twelve months' renewal service fees earned upon the agent's retirement, termination, death or disability.

3. Paragraph 11(f)(1) of the Agent's Agreement provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan shall cease and terminate in the event the agent engaged in the fire, casualty, health or life

insurance business within one year of the cancellation of the Agent's Agreement within a 25-mile radius of the former business location of the agent. Paragraph 11(f)93) provided that the liability of Nationwide for benefits under the plan shall cease and terminate if the agent at any time after cancellation of the agreement induced a policyholder of Nationwide to cancel or replace any insurance contract in force with Nationwide or furnish the name of a policyholder to a competitor.

4. In October, 1980, Nationwide terminated Darden's agreement because of "bad business practices." Following the termination of the agreement, Darden went back into business in December, 1983, at the same location he had utilized as a Nationwide agent. Darden began selling

insurance as an independent agent representing various competitors of Nationwide. Relying on the provisions of Paragraph 11(f) of the agent's agreement, Nationwide then notified Darden that he would not receive any of the benefits which he earned under the Agent's Security Compensation Plan.

5. The most recent agent's benefit statement which Darden had received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664 in the Deferred Compensation Incentive Credit plan and $65,706 in the Extended Earnings plan. Under the election which Darden had on file with Nationwide at the time of his termination, he was entitled to approximately $490 per month for the remainder of his life under the Extended Earnings portion of the plan, to

begin within sixty days after his termination. He was entitled to approximately $120 per month for the remainder of his life under the Deferred Compensation Incentive Credit Plan, to begin at age fifty. At his termination, Darden was 46 years of age.

6. Darden first became employed by Nationwide in September, 1960. For the first years of his employment he underwent training by Nationwide and received a salary on a weekly basis. After the initial training period, Nationwide began paying Darden on a commission basis. Over the years, Nationwide would periodically change the Agent's Agreement and Darden would sign a new contract.

7. As an insurance agent for Nationwide, Darden sold automobile insurance, fire insurance, life insurance,

and group health and life insurance. He serviced Nationwide policyholders by collecting premiums and forwarding them to Nationwide and assisted policyholders and Nationwide with the processing of claims. In addition to receiving commissions from Nationwide, Darden was paid bonuses based on persistency (renewals of policies) and a favorable loss ration.

8. Since 1960, Darden operated his business at 102 Highway 210, Spring Lake, North Carolina. Darden employed various clerical employees at his own expense to work for him. He paid the expenses of maintaining his office.

9. Nationwide furnished Darden with stationery, forms, manuals, books, pencils, paper clips and staples. On the front of the building Darden maintained a sign containing the word "Nationwide."

10. Nationwide obtained the appropriate insurance licenses for Darden from the State of North Carolina. The licenses indicated he was an agent for Nationwide, but Darden bore the expense of obtaining these licenses. Under Paragraph 4 of the Agent's Agreement, defendant agreed that he would represent Nationwide exclusively in the sale and service of insurance policies and would not write policies of insurance for other companies without the written consent of Nationwide. On occassion Darden would use other insurance companies when Nationwide could not provide the required insurance.

11. Darden paid his own employment taxes and insurance taxes from commissions forwarded to him by Nationwide. Darden was eligible for major medical insurance, disability insurance, and life insurance

through a plan maintained by Nationwide for its agents. Premiums were paid by Darden by deducting them from the commissions which he received from Nationwide. The Agent's Security Compensation Plan was funded entirely by Nationwide in addition to the commissions earned by the agents.

12. The Agent's Agreement provided that Darden was an independent contractor and that the agreement could be cancelled by either party at any time upon written notice.

13. Darden was subject to supervision by Nationwide with respect to his office procedures. The parties dispute the nature and extent of this supervision. Nationwide's regional supervisor states that Nationwide had no right to control Darden and that his communications with Darden were only suggestions,

recommendations, and ideas to assist Darden for the mutual benefit of both parties. Darden admits that he agreed to implement many of these suggestions, because they would work to the benefit of him as well as Nationwide.

14. Darden was subject to a number of directives on how to do business from district and regional sales managers. The directions which Darden received from his supervisors were mostly in the form of suggestions to which Darden and his sales managers would agree.

15. Beginning in early 1978, Nationwide conducted a series of meetings with Darden concerning the loss ratio of Darden's agency. On February 9, 1978, Nationwide's Regional Sales Manager, William R. Mayo, held a meeting with Darden. As a result of this meeting Darden

and Mayo agreed to certain procedures to be utilized in handling renewals. Also discussed were suggestions as to telephone quotas, collection of premiums, and interview techniques by Darden's staff. This understanding is expressed in a letter of February 12, 1978, from Mayo to Nationwide's District Sales Manager, Billy G. Kiker.

Darden and Kiker had a conference on April 5, 1979, where they "decided and agreed" on certain steps regarding automobile portfolio analysis. This conference resulted in an agreement on specific steps that would be implemented by Darden for new business. These steps included secretarial training to the satisfaction of Darden and Kiker, with the training to be arranged by Darden and with

Kiker to be informed of the sessions.

Other steps agreed upon were:

> Six months of premium will be collected. Telephone quotes will not be given. Each secretary will have a list of checkoff questions to ask. . . . The application will be fully filled out by secretaries . . . . The secretary will initial the application. . . . A claims log will be kept on voluntary business to identify claims frequency problems. All drivers with out-of-state licence should be questioned thoroughly. . .

Kiker's and Darden's agreement on this program is outlined in a letter of May 21, 1979, from Kiker to Darden. In this letter, Kiker also indicated his agreement in giving Darden support in specific areas in order to get Darden's loss ratio back in line. The letter indicated that Darden agreed to implement the program immediately and that the program would be reviewed by Kiker within 30 days. Kiker emphasized the requirement of Darden to follow this

program when he said, "However, this program must be conscientiously applied on an everyday basis. And it must be a constant with no deviation." The language used in this letter by Kiker indicates that this was a mandatory program to be followed by Kiker, although the specific steps in the program were reached as a result of Kiker's conference with Darden.

Additional specific action was agreed upon by Kiker and Darden as indicated by Kiker's letter to Darden of April 20, 1980. Specific action was stated as to voluntary claims filed, six month premium collection, telephone quotas, secretarial training, inspection of automobiles, writing full coverage, and ascertaining violations of out-of-state license holders. Kiker again agreed to provide his assistance in specific areas.

During these conferences, Darden was advised that he should close his office during the lunch hour, between 12:30 and 1:30; however, Darden chose not to do so. Darden also was instructed to write a full package of insurance for new business and to prepare weekly a new business report for the regional sales manager.

16. Darden's office was subject to unannounced audit by Nationwide.

17. Darden was not allowed to hire other insurance agents and could hire only clerical help. He attended monthly training sessions conducted by Nationwide. Sometimes, Nationwide would furnish Darden with names of potential prospects. Darden was required by Nationwide to keep a list and inform Kiker which leads had been solicited. The regional sales manager visited Darden's office and instructed him

on business practices. At meetings with agents, the regional sales manager would instruct them on how to sell insurance and advise them on the type of appearance the office should present to the public.

18. Darden was not required to attend meetings and training sessions scheduled by Nationwide; however, he was sent letters informing him that a meeting would be held and that it would be to his advantage to be there, since such meetings involved telling agents how to sell. Darden did not attend all of these meetings. Paragraph 1 of the Agent's Agreement reads in part: "We [Nationwide] may offer to you [Darden] from time to time training, counseling, and guidance based on our accumulated experience in the sale and servicing of business. However, it is understood that

you may reject or accept such offers at your discretion."

19. Nationwide employees would meet with Darden's office manager to give her directions on how to operate the office. The district sales manager for Nationwide would frequently visit Darden's office unannounced and observe the operation of the office. He would instruct Darden's employees on various procedures and would conduct training sessions for Darden's employees.[1]

20. The regional sales manager told Darden that his office was located in an undesirable place and to close his office on Wednesday afternoons and not to be open on Saturday. Although Nationwide suggested relocation of Darden's office and a change in his hours of operation, Darden did not do so.

21. Nationwide forwarded Darden's gross commissions to him without deduction of social security taxes, income taxes or similar items. Nationwide reported Darden's gross earnings to the Internal Revenue Service on Form 1099, rather than on Form W-2, which is used to report the income of employees. Darden calculated, reported, and paid all federal, state, and local taxes due on the commission income earned as an agent for Nationwide. Darden was not entitled to receive from Nationwide any sick leave, annual leave, vacation pay, jury duty pay, or any other such fringe benefits. Nationwide did not furnish to Darden any insurance for him or his family.

Nationwide provides its employees and not agents with holiday pay, vacation pay, sick pay, and pay for jury duty. Employees of Nationwide can purchase group life and

group health insurance through Nationwide, and Nationwide contributes toward the group premiums. Nationwide has a qualified retirement plan for its employees and the Agent Security Compensation Plan for its insurance agents, such as Darden.

22. Darden was solely responsible for all of his business expenses, including his office premises, overhead, insurance licenses, and similar items. Darden had the right to hire, fire, pay and control the employees who worked in his office. Darden had latitude to exercise his independent judgment as to the time, place and manner of soliciting and selling insurance and servicing policyholders. Darden was not required to account to Nationwide for his daily activities.

23. Nationwide did not provide Darden with an office or parking space or the

payment of any of his business expenses. Darden first rented his office premises and later purchased them. Darden was responsible for all of his costs of operation except for some manuals and office supplies furnished by Nationwide. He furnished and paid for his own automobile and other transportation and expenses attendant thereto.

24. The agent's agreement limited Darden's specific area to the state of North Carolina. The agent's agreement prohibited Darden from selling policies of companies other than Nationwide, and he could only sell the type of insurance specified in the agreement.

25. Following Darden's termination in October, 1980, he was required to turn over to Nationwide all of Nationwide's manuals, portfolios, reference guides, policies,

supplies, and policyholder files. If any policyholders called upon him for services, he was to direct them to the district sales manager. The business and records were not Darden's property, but belonged to Nationwide. After Darden was terminated, he could not sell his insurance agency because he did not own any interest in his renewals.

Proposed Conclusions of Law

ERISA covers any employee benefit plan established or maintained by any employer engaged in commerce. 29 U.S.C. Sec. 1003(a). An employee benefit plan is a plan established to provide various types of benefits to employees. 29 U.S.C. Sec. 1002(3) and Sec. 1002(2). ERISA's protection is for employees and not for independent contractors.

A. Independent Contractor or Employee?

The central issue in this lawsuit is whether Darden was an employee of Nationwide, so as to be covered by ERISA, or an independent contractor, for which ERISA provides no coverage. See U. S. Department of Labor Letter 75-40 (April 17, 1975).

ERISA defines "employee" simply as "any individual employed by an employer." 29 U.S.C. Sec. 1002(6). No further specific statutory guidance as to the meaning of "employee" is given by ERISA. In determining the meaning of "employee" under ERISA, courts have applied state common law tests. See Wardle v. Central States, Etc., 627 F.2d 820 (7th Cir. 1980). Other courts have attempted to fashion a federal test based on interpretation of other federal statutes and their perceived purposes.

Cohen v. Martin's, 537 F.Supp. 766 (S.D.N.Y. 1982); See also, U. S. v. Silk, 331 U.S. 704 (1947). Irrespective of which test is used, the two sources look at nearly identical factors in determining employee status. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, No. 83-129-CIV-5 (E.D.N.C., June 26, 1984). (See attachments).

The common law test focuses on the amount of control which the employer has over the worker. Continental Bus System, Inc. v. N.L.R.B., 325 F.2d 267 (10th Cir. 1963). Under common law, many factors are considered to determine the question, such as:

(1) the right to hire and fire assistants and associates without approval of employer;
(2) the provision by the employer of or investment by the employee in facilities and equipment;
(3) method of compensation;
(4) power to determine hours of work;

(5) duration of permanence of relationship; and
(6) degree of skill required.

Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra. These same factors are important under similar cases interpreting the employee/independent contractor relationship under federal statutes. U. S. v. Silk, supra.

Whether under federal statute or common law, the description of the relationship by the parties is not determinative. The substance of the relationship controls. Id.; Wardle v. Central States, Etc., supra. The distinction between the common law and federal law appears to be a broader definition of "employee" under the federal law. U. S. v. Silk, supra. This expansive reading of the term "employee" applies under ERISA. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra.

Congress enacted ERISA to prevent abuse by employers of retirement and benefit plans established for the people who work for them. ERISA protects employees with long years of employment from losing anticipated retirement benefits due to lack of vesting provisions. 29 U.S.C. Sec. 1001(a) and (c). The focus is not whether the workers meet the common law definition, but whether they have provided years of service for which they have been promised retirement benefits. Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra. Any deviation from the common law definition must be in favor of a more expansive definition of the term "employee." Id.

The important characteristic of an employer-employee relationship is the retention by the employer of the right to

direct and control the manner of work performance. Richardson v. Cent. States, Southeast & Southwest, 645 F.2d 660 (8th Cir. 1981); Cf. Sec 31.34.01(c)-1(b) Internal Revenue Service Tax Regulations; Raymond E. Kirshaw, 14 TC 168 (1950). In Richardson the court held that the plaintiff was an employee under ERISA. Richardson, a truck driver, owned his own tractor unit, which was licensed to King Van Lines and bore the company color. He pulled only company-owned or -authorized trailers. The company controlled assignments, booked shipments, elected payments, and maintained total authority over Richardson's work under an "exclusive contract" arrangement. Richardson reported his income for social security and tax purposes as derived from self-employment. He was paid on a percentage basis as

opposed to separate amounts for wages and equipment rental. Richardson paid for all of his own fuel, insurance, and portions of the license fees. In Short v. Cent. States S.E. & S.W. Areas Pen. Fund, 729 F.2d 567 (8th Cir. 1984), the court weighed similar factors in finding a truck driver an employee within the meaning of ERISA.

The master-servant relationship has been defined in opinions interpreting other statutes or regulations. In NLRB v. United Insurance Co., 390 U.S. 254 (1968), the Supreme Court held that a debit insurance agent was an employee under the National Labor Relations Act. The Court assessed the employment relationship along common law principles:

> The agents do not operate their own independent businesses, but perform functions that are an essential part of the company's normal operations; they need not have any prior training or experience, but

> are trained by company supervisory personnel; they do business in the company's name with considerable assistance and guidance from the company and its managerial personnel and ordinarily sell only the company's policies; the 'Agent's Commission Plan' that contains the terms and conditions under which they operate is promulgated and changed unilaterally by the company; the agents account to the company for the funds they collect under an elaborate and regular reporting procedure; the agents receive the benefits of the company's vacation plan and group insurance and pension fund; and the agents have a permanent working arrangement with the company under which they may continue as long as their performance is satisfactory.

Id. at 259.

Under Section 7701(8)(20) of the Internal Revenue Code, a full-time life insurance salesman is an employee with respect to provisions of the Internal Revenue Code. In Opinion Letter No. 81-43A, the U. S. Department of Labor has stated its opinion that a full-time life

insurance salesman is an employee rather than an independent contractor for the purposes of ERISA. In an interpretation of Title VII, however, the court in Jenkins v. Travelers Ins. Co., 436 F.Supp. 950 (D. Ore. 1977), held that insurance agents who were paid solely on the basis of commission were independent contractors.

The courts have balanced factors similar to the common law factors in determining employee status of insurance agents under ERISA. In Soloway v. Insurance Company, CIV-77-0849D (W.D. Okla. 1978) (a copy of said unpublished decision is attached to Defendant's Memorandum as Exhibit B, Docket No. 9b), the court listed the following factors in determining whether an employment relationship existed:

> (1) the extent to which the services in question are an integral part of the employer's business;

> (2) the employee's investment in facilities and equipment;
> (3) the nature and degree of control retained or exercised by the employer;
> (4) the employee's opportunity for profit or loss;
> (5) the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and
> (6) the permanency and duration of the relationship.

After considering these factors, the court in Soloway held that an insurance agent for New York Life Insurance Company was an independent contractor rather than an employee. The court found that the requirements of ERISA did not apply to Soloway in respect to Incentive Deferred Compensation Program under which Soloway would have received payments had he not been terminated as an agent. A number of facts in Soloway are similar to this case:

> (1) Soloway was expressly denominated an independent contractor in the written agency agreement with New York Life;

(2) Soloway was free to and did determine his own working hours and sales methods;
(3) Soloway was paid on a commission basis;
(4) Soloway did not receive vacation, holiday or sick pay;
(5) New York Life did not withhold income taxes on commissions paid to Soloway and reported his commissions on Form 1099 rather than Form W-2;
(6) Soloway was contractually limited to a specific geographical area;
(7) Soloway was prohibited from selling policies of other companies and could only sell the types of insurance specified in the agent agreement. Also, New York Life reimbursed Soloway for a portion of his expenses and made available to him a furnished office and parking space.

The Soloway court found that New York Life had little control over how Soloway sold the insurance. Soloway was completely free to determine the means by which the sales would be consummated. He used his own judgment and initiative to determine the working hours and development of prospective sales as well as sales techniques. After Soloway had completed

the initial training period, New York Life exercised little control over Soloway in the field. Soloway was free to determine where and when to solicit prospective sales. Soloway was not required to submit regular reports to New York Life or regularly attend meetings.

In Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra, U. S. District Court Judge James C. Fox, determined the employer-employee question in a case very similar to this one. Judge Fox entered summary judgment in favor of the insurance agent, finding that he was an employee of North Carolina Farm Bureau within the meaning of ERISA. The court found that the evidence indicated extensive control over and dominance of the Farm Bureau in its dealings with agents and agency managers. The court noted the

following factors as indicative of the agent's status as an independent contractor:

(1) The existence of Farm Bureau's qualified pension plan covering employees other than agents;
(2) Agents were advised that they were considered to be treated as independent contractors by Farm Bureau;
(3) Agents were paid on a commission basis, with all commission payments made by Farm Bureau being reported to the Internal Revenue Service on Form 1099 as commissions earned;
(4) Farm Bureau never issued W-2 Forms to such agents. FICA or FUTA taxes were not withheld or paid by the insurance company on behalf of said agents;
(5) Agents were not required to work any set hours by Farm Bureau and were in control of and independently responsible for their own schedules, appointments, and vacation time;
(6) The agents retained as their proprietary interest file cards of their customers and contacts made wile agents of the insurance company even after termination of their licensing agreement with Farm Bureau, and, in fact, after termination of their contracts, certain plaintiffs solicited their old defendant's customers and contacts in their new business;
(7) Certain agents would maintain separate accounts in their own names to make cash deposits of money paid for

premiums, and would in turn write checks on these amounts to the defendant for premiums due;
(8) Many of the agents maintained an office in their home and deducted those expenses on their tax returns;
(9) The agents filed tax returns with the Internal Revenue Service indicating they were self-employed;
(10) The agents paid for their own postage, long-distance calls, supplies, travel and entertainment expenses;
(11) Farm Bureau did not provide at its expense any health or life insurance for the agents;
(12) A number of agents had in force IRA's or HR-10 plans during the same period in which they were licensed with Farm Bureau and during the same time when applicable law did not allow such individual plans to be maintained unless plaintiff had self-employment status.

After considering these factors and others, the court found that the totality of the circumstances indicated that Farm Bureau, because of its dominant position, exercised control over the agents' means of performance. Farm Bureau furnished each plaintiff a document entitled "Manual of Instruction or Memorandum of Understanding

between North Carolina Farm Bureau Federation and (Name of County) County Farm Bureau." Agents either substantially conformed to the "suggestions" contained in the memorandum or were terminated. The memorandum gave detailed "suggestions" to agents regarding the performance of their duties, which, in fact, amounted to Farm Bureau's control over the agents. This same type of dominance and control was present between Nationwide and Darden.

In Fraver, the court found the fact of control to arise from the economic disparity between Farm Bureau and the agents. The court found the dominance to be evidence by the following facts:

> (1) The plaintiffs had almost no personal investment in their business. Farm Bureau provided their offices, furniture, secretary, all their insurance forms, applications and their phone service. All of these remained Farm Bureau property. The court found that Farm Bureau controlled the tools

> utilized by the plaintiff in the performance of their occupation. The plaintiffs used their own personal cars;
> (2) The plaintiffs' knowledge of the insurance business was acquired solely through training provided by Farm Bureau and their performance of Farm Bureau's business. Farm Bureau held regular training meetings at which attendance by the agency force was required, and the defendant provided an assortment of training and rate manuals and general guidelines;
> (3) During the training period Farm Bureau agents were paid salaries for the first few years of employment. They were then paid multiple commissions;
> (4) Plaintiffs were only permitted to sell insurance for Farm Bureau, or Southern Farm Bureau Life Insurance Company and for North Carolina Blue Cross and Blue Shield under plans approved by county boards. The plaintiffs were expected to work full-time on such sales. They were required to account and report directly and promptly to Farm Bureau for all collection and policy applications. Farm Bureau had the power to reject the applications. The court concluded that the agents worked full-time for a single employer with no independent use of skills;
> (5) Farm Bureau had the power by contract to unilaterally establish territories in which the agents could solicit clients. Farm Bureau could change those territories at any time.

Considering these factors, the court found the relationship between the insurance agents and Farm Bureau to be that of employer-employee.

The Court must analyze the various factors of the employment relationship in light of the foregoing authority to determine whether Darden was an independent contractor or employee. Darden first became employed by Nationwide in September 1960. In the first years of his employment he underwent training by Nationwide and was paid a salary on a weekly basis. After his initial training period, Darden signed an Agent's Agreement and Nationwide began paying him on a commission basis. Over the years, Nationwide would periodically unilaterally change the Agent's Contract and Darden would sign the new contract.

As an insurance agent for Nationwide, Darden sold automobile insurance, fire insurance, life insurance and some group health and life insurance. He serviced Nationwide policyholders by collecting premiums and forwarding them to Nationwide and assisted policyholders and Nationwide with the processing of claims. In addition to receiving commissions from Nationwide, Darden was paid bonuses based on renewal of policies and a favorable loss ratio.

Darden operated his business in the same location since 1960. He first rented, then later purchased his office. Darden employed various clerical employees at his own expense to work with him at his office. Darden paid the expenses of maintaining the office, except for some office supplies provided by Nationwide. On the front of

the building Darden maintained a sign containing the word "Nationwide."

Nationwide obtained the appropriate insurance license for Darden from the State of North Carolina. The license indicated Darden was an agent of Nationwide, but he bore the expense of obtaining the license. Under Paragraph 4 of the Agent's Agreement, Darden agreed that he would represent Nationwide exclusively in the sale and service of insurance policies and would not write policies of insurance for other companies without the written consent of Nationwide. Darden would use other insurance companies only when Nationwide could not provide the required insurance. Darden paid his own employment taxes and income taxes from commissions forwarded to him by nationwide. Darden was eligible to purchase major medical insurance,

disability insurance and life insurance through a plan maintained by Nationwide for its agents. The Agent's Security Compensation Plan was paid entirely by Nationwide.

The Agent's Agreement indicates that Darden was an independent contractor; however, Darden was subject to supervision by Nationwide with respect to his office procedures. Nationwide ultimately terminated its relationship with Darden because of his "bad business practices."

The defendant says that the detailed nature of supervision of Darden is a material factual issue in this action. The Court has reviewed the undisputed facts as to this issue and the inferences therefrom in a light most favorable to the defendant. The Court has considered the facts in dispute to be true according to the

defendant's interpretation. Even by doing this, the Court concludes that there are not material facts in dispute, nor do the reasonable inferences arising therefrom create a material factual dispute.

Darden's relationship to Nationwide is similar to the relationship between the debit insurance agent and United Insurance Company in NLRB v. United Insurance Co., supra, in which the court held that debit insurance agents were employees and not independent contractors. Darden's relationship to Nationwide is even more analogous to that of Fraver and Farm Bureau in Fraver v. North Carolina Farm Bureau Mutual Insurance Company, supra, in which Judge Fox found Fraver to be an employee within the meaning of ERISA. A major distinction in Fraver is that the Farm Bureau agents had very little personal

investment in their businesses. Darden owned his building and office equipment; however, this factor is balanced by another distinction in Fraver--that of the Farm Bureau agents retaining a proprietary interest in their customer files and contacts. Accordingly, this Court concludes on the basis of Fraver and the other authorities cited herein that Darden was an employee of Nationwide under ERISA.

B. Employee Pension Plan Under ERISA

The next question is whether Nationwide's Agent Security Compensation Plan was an employee pension plan within the meaning of ERISA if the plan provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. 29 U.S.C. Sec. 1002(2). Both the deferred

compensation plan and extended earnings plan meet this criteria.[2]

Accordingly, this Court concludes that Nationwide's Agent's Security Compensation Plan was an employee pension plan subject to ERISA. As much, the covenant not to compete is null and void under ERISA. Winer v. Edison Brothers Stores Pension Plan, 593 F.2d 307 (6th Cir. 1979). Pursuant to ERISA, Darden had a non-forfeitable right to his benefits under the extended earnings plan, 29 U.S.C. Sec. 1053(a)(2)(A), and the deferred compensation plan, 29 U.S.C. Sec. 1053(a)(2)(C).[3] Accordingly, Darden is entitled to summary judgment for the benefits to which he is entitled under Nationwide's Agent's Security Compensation Plan.

C. Pre-Judgment and Interest and Attorney Fees

Under the election which Darden had on file with Nationwide, he was entitled to commence receiving his annuity under the extended earnings plan shortly after his services were terminated and under the deferred compensation plan when he attained the age of 50, which he has already attained. Without an award of prejudgment interest, Darden will not be made whole since he was entitled to commence receiving funds approximately four years ago. To allow Nationwide to retain the interest on funds wrongfully withheld would constitute an unjust enrichment. Short v. Central States, S.E. and S.W., Areas Pension Fund, supra.

Under ERISA, an award of attorney fees is discretionary. 29 U.S.C. Sec. 1132(g). Courts have considered the following

factors in determining whether to award attorney fees under ERISA:

> (1) The degree of the opposing party's culpability or bad faith;
> (2) The ability of the opposing part to satisfy an award of attorney fees;
> (3) Whether an award of attorney fees against the opposing parties would deter others from acting under similar circumstances;
> (4) Whether the party requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA, and;
> (5) The relative merits of the party's position. Hummell v. S. E. Rikoff and Co., 634 F.2d 446 (9th Cir. 1980).

Neither party has acted in bad faith in this case. Nationwide can afford an award of attorney fees. Such an award would deter Nationwide from refusing to pay claims by other agents similarly situated to Darden. Darden maintained this action individually; however, it may benefit other agents. Nationwide's position has merit. The resolution of the employee/independent contractor question is close. Similar

provisions of Nationwide's Agent's Security Compensation Plan have not been interpreted by other courts. In weighing these factors, this Court concludes that an award of attorney fees against Nationwide should be DENIED, because of the lack of bad faith by Nationwide and the merits of Nationwide's position.

D. Conclusion

In conclusion, this Court recommends that summary judgment be entered in favor of the plaintiff, requiring the defendants to pay the sums to the plaintiff as required by Nationwide's Agent's Security Compensation Plan, plus pre-judgment interest. Plaintiff's request for attorney fees should be DENIED.

THIS MEMORANDUM AND RECOMMENDATION ENTERED, this the 7th day of March, 1985.

CHARLES K. McCOTTER, JR.
United States Magistrate

1 The plaintiff in support of his motion for summary judgment has submitted an affidavit from his office manager, Patricia Harkey. The defendants object to this affidavit as being unfairly prejudicial under Federal Rule of Evidence 403, because Mr. Kiker, the district sales manager, died prior to the filing of this suit and cannot respond to certain matters stated in said document. Also, the defendants contend there is contradictory evidence of record to the statements of this affidavit. This latter objection is without merit. The former objection is overruled because the statements were made by Kiker, as an agent of Nationwide, concerning a matter within the scope of his agency or employment during the existence of the relationship. Fed.R.Ed. 801(d)(2)(D); United States v. Mandell, 591 F.2d 1347 (4th Cir. 1979).

2 Nor do either of these plans meet the exemption of Department of Labor Regulation, 29 CFR Sec. 2510.3-2(b), et seq, setting forth the circumstances under which a severance pay plan will not be considered an employee pension benefit plan. The Regulation states that a plan providing severance benefits on account of the termination of an employee's service will not be considered an employee pension benefit plan if (1) the benefits are not contingent, directly or indirectly, upon the employee's retiring; (2) the total amount of severance benefits does not

exceed the equivalent of twice the employee's annual compensation for the year immediately preceding termination; and (3) all such payments to an employee are completed within 24 months after the termination of the employee's services.

3 Darden had a non-forfeitable right to the benefits under Nationwide's Agent's Security Compensation Plan. The deferred compensation benefits were not payable until after the agent's agrement was cancelled by termination or otherwise. The agent could elect various options. Darden elected to have his deferred compensation paid to him by a life annuity. Under the deferred compensation plan, Nationwide adopted the Rule of 45 minimum vesting schedule of ERISA. 29 U.S.C. Sec. 1053(a)(2)(C). Under the Rule of 45, if the years of service equal or exceed 10 years, and if the sum of the age of the employee and the service equals or exceeds 55, then the employee has a non-forfeitable percentage interest of 100% interest in the benefits. When nationwide terminated Darden, he had completed 20 years of service and was age 46. The sum of his age and service equalled 66. His service exceeded 10 years. Therefore, Darden had a non-forfeitable interest in 100% of the benefits of the deferred compensation plan.

The extended earnings benefits could not be paid under Section 11(b) of the agent's agreement until after the agreement was cancelled. Then the benefits would be paid over a three year period unless the agent elected otherwise. Darden elected to have the extended earnings benefits paid to him by a life annuity. Under the extended

earnings plan, benefits are fully vested after the agent has completed five years of service with Nationwide. This exceeds the minimum vesting requirement of ERISA which provides that no employee must have a non-forfeitable interest of 100% of his accrued benefits after 10 years of employment. 29 U.S.C. Sec. 1053(a)(2)(A). Since Darden had completed 20 years of service, he had a non-forfeitable right under ERISA to the benefits provided by the extended earnings plan.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN, Plaintiff	)	
v.	)	ORDER
NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Defendants	)	

[Filed June 22, 1988]

Robert T. Darden filed this action under ERISA (29 U.S.C. Sec. 1001-1461) in an attempt to obtain what he alleges to be his statutorily protected retirement income. Issues have arisen regarding Darden's status as an "employee" under ERISA and whether Nationwide's plan constitutes a "pension plan" under ERISA.

In remanding this action, the Court of Appeals held that this court had applied the incorrect standard in determining

whether Darden was an "employee" under ERISA. The Court of Appeals set forth a standard for determining whether a person is an "employee" under ERISA. The Court of Appeals also identified salient points to be investigated in determining whether a plan is a "pension plan." The court concluded by stating that the relevant questions were not suitable for summary judgment disposition there were still several issues of disputed fact. Darden v. Nationwide Mutual Insurance, 796 F.2d 701 (4th Cir. 1986).

Cross motions for summary judgment have been filed by the parties. The court heard argument on the motions on April 11, 1988. On the basis of argument and briefing, the court makes the following findings and conclusions.

The court finds that the question of whether Darden is an "employee" under ERISA is still unsuitable for summary judgment disposition. Accordingly, the parties' motions for summary judgment on that ground are DENIED.

The plan at issue in this case is comprised of two parts: Deferred Compensation Incentive Credits and Extended Earnings. The Extended Earnings program compensates an agent by paying him a sum equal to his earnings from renewal fees over the prior twelve months. The payment is made to the agent upon retirement or termination for any reason other than criminal act or fraud. Defendant argues that this form of compensation does not constitute a "pension plan" under ERISA. 29 U.S.C. Sec. 1002(2)(A).

The plan here is similar to the plan addressed in Fraver v. North Carolina Farm Bureau, 801 F.2d 675 (4th Cir. 1986). In Fraver the court found that a final compensation arrangement between the company and agent was not subject to ERISA. The court wrote:

> The post-termination benefits are calculated on the basis of the agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended term. . . . The agent could terminate his contract at any age, and the payments were to be made regardless of the reason for the termination except when the agent was terminated for reasons of fraud or criminal act. The amount of the payment is tied to only one factor, the amount of business in the last year prior to termination. . . . [T]he terms in question simply established business created by the agent, and . . . these payments do not constitute retirement income.

801 F.2d at 678. The reasoning of the Fraver court is compelling under the present set of facts. See also Wolcott v. Nationwide Insurance, No. C-2-84-854, slip. op. at 11-12 (S.D. Ohio, 1987). Darden would be entitled to his Extended Earnings upon separation with Nationwide no matter what his age as long as he had been with the company for five years or more. The amount of Extended Earnings is computed based upon one factor only--the amount of renewal commissions generated over the previous twelve months. The court finds, therefore, that the Extended Earnings program is not a "pension plan" within the meaning of ERISA.

The court does find, however, that the DCIC and Extended Earnings plans may be severed. The court finds that the question of whether the DCIC plan is a "pension

plan" under ERISA is also inappropriate for summary judgment disposition and accordingly motions made on this ground are DENIED.

The case will be restored to the trial calendar. The trial will be limited to the questions of whether Darden is an "employee" and whether the DCIC plan is a "pension plan" under the factors set forth in the Court of Appeals opinion.

All motions for summary judgment are DENIED. The clerk is directed to replace this action on the trial calendar.

SO ORDERED this 20th day of June, 1988.

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

(3)

No. 90-1802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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July 22, 1991

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IN THE

Supreme Court of the United States

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Petitioners,

v.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company (collectively, "Nationwide")[1] hereby submit their Reply to the Brief of Opposition to the Petition for Writ of Certiorari filed by Robert T. Darden ("Darden"). In accordance with Rule 15.6 of this Court's Rules, this brief is limited to arguments first raised in the Brief in Opposition.

---

[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners was included at page (ii) of the Petition. No amendments are required to make such listing currently accurate.

The Brief in Opposition does not deny that the standard for determining "employee" status under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is both an important question of federal law and the subject of conflict among the courts of appeals. Darden's only cognizable objection to Nationwide's Petition [2] is that the conflict among the lower courts existed at the time this Court denied the petition for certiorari in *Plazzo v. Nationwide Insurance Co.*, No. 88-4016 slip op. (6th Cir., Dec. 22, 1989), *cert. denied*, No. 89-1499 (Oct. 29, 1990). Because the Fourth Circuit's *Darden II* decision [3] was pending at the time the Court considered the petition in *Plazzo*, it was then uncertain whether the Fourth Circuit would apply its *Darden I* standard [4] in a manner conflicting in result with the common-law agency principles applied under ERISA in the Fifth, Sixth and D.C. Circuits, discussed in the Petition. *Darden II* confirms that there is a conflict on this fundamental ERISA issue ripe for the Court's review.

As discussed in the Petition, the *Darden* standard also conflicts with the United States government's interpretation of ERISA. The Brief in Opposition reads the *amicus* brief of the United States filed with respect to the petition for certiorari in *Plazzo* as arguing that "courts utilizing the common law approach may be applying an unduly restrictive approach and ignoring this Court's decision

[2] The majority of the Brief in Opposition is directed to an argument on the merits of the question presented by the Petition. The only contention that requires a response at this time is the suggestion that Darden was not acting as an independent contractor for Nationwide under traditional agency priciples. Brief in Opposition at 11-12. As discussed in Nationwide's Petition at 5, the district court found that Darden was *not* Nationwide's employee at common law and the Fourth Circuit supported that conclusion in *dicta*.

[3] 922 F.2d 203 (4th Cir. 1991).

[4] 796 F.2d 701 (4th Cir. 1986).

involving remedial social legislation . . . ." Brief in Opposition at 16. Darden plainly misstates the thrust of the government's position. The *amicus* brief clearly states at 11-12 that "employee" status under ERISA should be determined under common-law factors, taking into account those factors as a whole so as to avoid an overly technical approach that would frustrate Congress's remedial goals in enacting ERISA.

The government's position is confirmed by Department of Labor Advisory Opinion 91-17A (reprinted as an appendix to this brief), which became available subsequent to the filing of Nationwide's Petition. The Department of Labor, the agency responsible for the administration of ERISA, described the proper determination of ERISA "employee" status as follows:

> The term "employee" is defined in ERISA section 3(6) to mean "any individual *employed* by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of ERISA section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles, taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished, whether the person for whom services are being performed has the right to discharge the individual performing the services, whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, *etc.*

The *Darden* standard thus conflicts in both form and result with the "employee" standard adopted by the

United States and three other courts of appeals. This important federal question merits review by this Court.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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July 22, 1991

APPENDIX

APPENDIX

[SEAL]

[Apr. 5, 1991]

91-17A

Mr. L. J. Darter, III
Office of Commissioner of Insurance
Seventh Floor, West Tower
Floyd Building
2 Martin Luther King, Jr., Drive
Atlanta, Georgia 30334

Dear Mr. Darter:

This is in response to your request for an advisory opinion regarding the status of the health benefit program sponsored by the Synesys Service Corporation (Synesys) under title I of the Employee Retirement Income Security Act (ERISA). Specifically, you have requested an opinion as to whether the Synesys health plan is a multiple employer welfare arrangement (MEWA) within the meaning of ERISA section 3(40) and, therefore, subject to applicable state insurance regulation.

According to your letter, Synesys represents that it is engaged in the business of "employee leasing." Client employers sign service agreements with Synesys, under which Synesys provides certain services in connection with employees. Synesys maintains that the employees are actually employees of Synesys, and are merely "leased" to the client. With respect to the Synesys health plan, Synesys maintains that the plan is a single employer plan under ERISA and, as such, is exempt from state regulation. Accompanying your request was a copy of Synesys' 11/89 Client Service Agreement (the "11/89 Agreement"), which, according to your letter, appears to be the Agreement under which all existing clients are contracted.

Also accompanying your request was a copy of a revised Client Service Agreement dated 6/90 (the "6/90 Agree-

ment") with respect to which you have inquired whether the Department's views would be any different if that Agreement were put into effect.

Pursuant to Section 1(a) of the 11/89 Agreement, Synesys agrees to furnish the client certain "staff management services" relating to specified job function positions. Employees filling such job function positions are referred to as "covered employees." Pursuant to Section 1(b), the client agrees to adopt employee benefit plans sponsored by Synesys. Section 7(a) of the 11/89 Agreement provides, in relevant part, that "Synesys shall be exclusively responsible for administrative employment matters such as payment for all covered employees' wages, payment of all federal, state and local employment taxes, providing workers' compensation coverage, obtaining group health insurance, and administering pension plan coverage as well as other non-obligatory fringe benefit programs for covered employees." Section 7(b) provides that the "[c]lient shall have the sole responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining and firing of individuals assigned to fill Client's job function positions; however, Synesys shall handle all administrative matters relating to these functions." Section 7(c) provides, in relevant part, that "[i]t is understood and agreed that Client shall be the employer of all covered employees and shall retain all rights and obligations arising by statute or common law and pertaining solely to the employment relation." Section 7(c) also provides that, notwithstanding the foregoing, the parties understand that various statutory provisions, such as Section 3401(d) of the Internal Revenue Code may define Synesys as an "employer" for certain narrow purposes.

The term "multiple employer welfare arrangement" is defined in ERISA section 3(40)(A) to mean:

> . . . an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained—
>
> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements, or
>
> (ii) by a rural electric cooperative.

Inasmuch as there is no indication that the Synesys health plan is established or maintained under or pursuant to one or more collective bargaining agreements or by a rural electric cooperative, the only issue relating to the plan's status as a MEWA appears to be whether the Program provides health benefits "to the employees of two or more employers." The resolution of this issue is dependent on whether, for purposes of ERISA section 3(40), the employees covered by the Synesys health plan are employees of a single employer (i.e., Synesys) or more than one employer (i.e., Synesys' Clients).

Section 3(5) of ERISA defines the term "employer" to mean:

> any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

As reflected above, the term "employer", for purposes of title I of ERISA, encompasses not only persons with respect to which there exists an employer-employee relationship between the employer and individuals covered by a plan (i.e., persons acting directly as an employer), but

also certain persons, groups and associations, which, while acting indirectly in the interest of or for an employer in relation to an employee benefit plan, have no direct employer-employee relationship with the individuals covered under an employee benefit plan. Therefore, it does not necessarily follow that, merely because a person, group or association may be determined to be an "employer" within the meaning of ERISA section 3(5), the individuals covered by the plan with respect to which the person, group or association is an "employer" are "employees" of that employer.

The term "employee" is defined in ERISA section 3(6) to mean "any individual *employed* by an employer." (Emphasis added). An individual is "employed" by an employer, for purposes of section 3(6), when an employer-employee relationship exists. For purposes of ERISA section 3(6), whether an employer-employee relationship exists will be determined by applying common law principles, taking into account the remedial purposes of ERISA. In making such determinations, therefore, consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished, whether the person for whom services are being performed has the right to discharge the individual performing the services, whether the individual performing the services is as a matter of economic reality dependent upon the business to which he or she renders services, *etc.*

On the basis of Synesys' 11/89 Client Service Agreement, there is no indication that Synesys maintained, or ever intended to maintain, an employer-employee relationship with individuals participating in the Synesys health plan as "covered employees" pursuant to the 11/89 Agreement (*See*: section 7(b)). In fact, Synesys specifically provided in its Agreement that the client, rather than Synesys, shall be the employer of all covered employees and retain all rights and obligations arising with respect thereto. Accordingly, it is the view of the Department that the individuals participating as "covered employees" under the 11/89 Agreement in the Synesys health plan would be "employees" of the client employers.*

Therefore, unless the client employers whose employees are covered under the Synesys health plan constitute a "control group" within the meaning of section 3(40)(B) of ERISA, it is the view of the Department that, with respect to individuals participating as "covered employees" under the 11/89 Client Service Agreement, the Snyesys health plan would be an arrangement providing benefits to the employees of two or more employers and, therefore, a multiple employer welfare arrangement within the meaning of ERISA section 3(40)(A). Accordingly, the preemption provisions of ERISA would not preclude state regulation of the Synesys health plan to the extent provided in ERISA section 514(b)(6)(A). In this regard, we are enclosing, for your information, a copy of advisory opinion No. 90-18A (dated July 2, 1990) which discusses the scope of the states' authority to regulate MEWAs pursuant to section 514(b)(6)(A) of ERISA.

Pursuant to your request, we have also reviewed the Client Service Agreement dated 6/90. Similar to the 11/89 Agreement, the 6/90 Agreement vests in the client the sole right and responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining, directing, controlling and firing individuals assigned to fill client's job function positions (Section 9(e)). While,

---

* Although we conclude in this situation that the individuals participating as "covered employees" in the Synesys health plan under the 11/89 Agreement are "employees" of the client employers, the Department notes that Synesys may also be considered an "employer" within the meaning of section 3(5) of ERISA.

unlike the 11/89 Agreement, the 6/90 Agreement does not specifically indicate that the client shall be the employer, the absence of such an indication would not be significant where the client in fact maintains the employer-employee relationship with the "covered employees." Under the terms of the 6/90 Agreement, inasmuch as the client, rather than Synesys, would appear to be maintaining the employer-employee relationship with the "covered employees", the Department would, in the absence of facts to the contrary, reach the same conclusion as indicated above with respect to the 11/89 Agreement.

In conclusion, it should be noted that, while the foregoing views are based on the terms of the Agreements accompanying your request, a contractual arrangement will not be determinative of an employer-employee relationship when the facts and circumstances of the situation contradict the terms of the contract.

The preceding constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this opinion is issued subject to the provisions of that Procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

Enclosure

(4)

No. 90-1802

Supreme Court, U.S.
FILED
NOV 29 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

ROBERT T. DARDEN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a person who operates his own insurance business under an agreement to represent one insurance company on an exclusive basis is an "employee" of that insurance company under Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1802

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.,
PETITIONERS

v.

ROBERT T. DARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The issue in this case is whether respondent Robert T. Darden, an insurance agent, was an "employee" of petitioners, the Nationwide insurance companies, within the meaning of Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6). The Department of Labor and the Internal Revenue Service have substantial administrative responsibilities under the Act. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374. Performance of those responsibilities often depends upon the definition of "employee," because that term is used in a variety of provisions throughout the Act. These agencies have accordingly issued opinions and adopted positions concerning the proper definition of the term "employee" under ERISA.

For example, the Department of Labor recently issued an opinion letter on the issue of whether a health plan was a "multiple employer welfare arrangement" within the meaning of Section 3(40) of ERISA, 29 U.S.C. 1002(40), which turned on whether the participants in the plan were employees of the company marketing the plan. Dep't of Labor, Op. Ltr. 91-17A (Apr. 5, 1991). The IRS is also required to determine who are "employees" of a company, because the minimum participation rules of Title II of ERISA, 26 U.S.C. 401-410, only provide favorable tax treatment of pension plans if benefits are extended to a broad group of "employees." Because this case involves the meaning of one of ERISA's basic definitional terms, the United States has a strong interest in the resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

1. Section 3(2)(A) of ERISA, 29 U.S.C. 1002(2)(A), provides in pertinent part:

> Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—
>
> > (i) provides retirement income to employees, or
> >
> > (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond[.]

2. Section 3(6) of ERISA, 29 U.S.C. 1002(6), provides:

> The term "employee" means any individual employed by an employer.

STATEMENT

1. a. From 1962 through 1980, respondent Robert T. Darden sold Nationwide insurance in Spring Lake, North Carolina, pursuant to the terms of a series of agency agreements. The pertinent terms of the agreement are not in dispute. Darden was required to represent Nationwide on an exclusive basis, and Nationwide compensated Darden by payment of commissions based on his sales performance. Darden controlled the manner in which he performed his sales responsibilities: he rented and later purchased an office at his own expense; he determined his own hours; he was free to solicit sales "wherever, whenever, and from whomever he wished"; and he hired and fired his office help. Pet. App. 48a-49a; Br. in Opp. App. 20a. Neither party characterized the agency relationship as one of employment in their formal records. Nationwide's business records listed Darden as an "independent contractor and not an employee." Pet. App. 49a. Similarly, Darden's tax returns reported his commission income and business expenses as income derived from a sole proprietorship—not as income derived from employment. *Ibid.*

Although Darden was not eligible to participate in the pension plan Nationwide maintained for those individuals it considered to be its employees, the agency agreements did establish a "Deferred Compensation Incentive Plan" and an "Extended Earnings Plan" for insurance agents such as Darden. Under the terms of the deferred compensation incentive plan, "Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies." Pet. App. 33a. Under the extended earnings plan, "Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months." *Id.* at 34a. The agency agreements also provided that

Nationwide's obligation to pay such benefits would cease if Darden competed with Nationwide within a twenty-five-mile radius of Darden's former business location within one year after the cancellation of the agency agreement, or induced a Nationwide policyholder to cancel an insurance contract with Nationwide at any time after the termination of the agency relationship. *Ibid.*

b. In 1980, shortly after Nationwide terminated Darden's agency contract because the company determined that Darden was a "marginal agent," Darden began competing with Nationwide at the same business location he had used while representing Nationwide. Pet. App. 48a. Consequently, Nationwide informed Darden that it would not pay him his deferred compensation benefits, which amounted to $28,664 at the time of his termination, or his extended earnings benefits, which amounted to $65,706. *Id.* at 34a.

Darden then brought this action against Nationwide under Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a). Darden claimed that he was a "participant" entitled to bring suit under Section 502(a); the plans were "pension plans" within the meaning of Section 3(2)(A), 29 U.S.C. 1002(2)(A); and his benefits under the plans had become nonforfeitable pursuant to Section 203(a), 29 U.S.C. 1053(a). Darden's claims depended in part on whether he was an "employee" under Section 3(6), 29 U.S.C. 1002(6): first, he could only qualify as a "participant" entitled to bring suit under Section 502(a) if he was an "employee or former employee" of Nationwide, Pet. App. 36a-37a; § 3(7), 29 U.S.C. 1002(7), and second, Section 3(2)(A) defines a "pension plan" as a plan that "provides retirement income to *employees*" or "results in a deferral of income by *employees* for periods extending to the termination of covered employment or beyond," 29 U.S.C. 1002(2)(A) (emphasis added). If Darden was an "employee" he would be entitled to the benefits withheld by Nationwide, as long as the benefits were in the nature of "pension" benefits, because (1) the benefits he claimed would have been vested under the terms of ERISA, and (2) Section 203(a) of ERISA would have precluded forfeiture of those benefits under the noncompetition clauses of the agency agreement.

2. The district court initially concluded that Darden was not an employee of Nationwide based upon decisions of this Court interpreting Congress's use of the term "employee" in other remedial social legislation. The district court relied upon the common law agency factors this Court used in *United States* v. *Silk*, 331 U.S. 704 (1947), to determine whether truck drivers were employees for purposes of the Social Security Act. The court considered "(1) [the] degree of control over the workers; (2) the opportunity for the worker for profit or loss from his own efforts; (3) the investment by the workers in equipment; (4) the permanency of the relationship; and (5) the skill required of the workers to carry out their duties." Pet. App. 49a-50a.[1] The district

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[1] Those factors were borrowed from the common law test set forth in the Restatement (Second) of Agency § 220 (1958). The Restatement defines a "servant" as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." *Id.* § 220(1). The Restatement sets out ten factors for consideration "[i]n determining whether one acting for another is a servant or an independent contractor," *id.* § 220(2):

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;

court also relied on this Court's conclusion in *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 258 (1968). In defining the term "employee" under the National Labor Relations Act, the Court observed that "[w]hat is important is that the total factual context is assessed in the light of the pertinent common-law agency principles." Pet. App. 50a.

Based upon these principles, the district court concluded that " '[t]he total factual context' of Mr. Darden's relationship with Nationwide shows that he was an independent contractor and not an employee." Pet. App. 50a. The district court emphasized that "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money." *Id.* at 49a.

3. The court of appeals reversed. Pet. App. 32a-46a. The court recognized that under "traditional common law principles, Darden most probably would not qualify as an employee." *Id.* at 39a.[2] But the court held that "the

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(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

This test was developed to determine when a third party can recover against a principal for the tortious conduct of an agent, but it has been used by state courts in a variety of contexts.

[2] In reaching that conclusion, the court noted that "Darden was relatively free to run his business as he chose"; he "was compensated through commissions, rather than through a salary," and "received his commissions from Nationwide without deduction for income taxes or other charges"; "[h]e paid his business expenses out of his commissions, including office maintenance and utilities and the salaries of his clerical staff"; he "owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes"; and "Darden and Nationwide referred to their relationship as one between independent contractors," so that he "was not entitled to receive certain benefits reserved for Nationwide 'employees.' " Pet. App. 39a-40a.

common-law test for the relationship of master and servant is not the appropriate standard for application here." *Id.* at 40a. In reaching that conclusion, the court of appeals relied on this Court's decisions in *Silk* and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 120-129 (1944), which indicate "that the definition of 'employee' should be tailored to the purposes of the statute being construed." Pet. App. 40a. Thus rejecting "the common-law test of master and servant," the court fashioned a test "focusing on the objectives and purposes of ERISA," *id.* at 43a, from the congressional statement of purpose set out in Section 2 of ERISA, 29 U.S.C. 1001.[3] The court of appeals described its test as follows, Pet. App. 41a-42a:

> The protected class described in the statement of purpose encompasses, first of all, persons whose retirement benefits were 'anticipated.' * * * Second, persons within the protected class must have relied on that expectation by remaining for 'long years,' or a substantial period of time, in the 'employer's' service, and by foregoing other significant means of providing for their retirement. * * * Finally, implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits.

Applying its test, the court determined that "Nationwide created a reasonable expectation on Darden's part that benefits would ultimately be paid to him." Pet. App. 41a. The court also indicated that "[t]here is also evidence in the record indicating Darden's reliance on that expectation." *Id.* at 42a. The court nevertheless remanded the case for further factual development on the issues of Darden's reliance and "the respective bargaining strength of the parties." *Id.* at 43a.

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[3] In Section 2, Congress said that because "many employees with long years of employment are losing anticipated retirement benefits," it was taking steps to assure "the equitable character of such plans and their financial soundness." See Pet. App. 41a.

4. On remand, the district court determined that Darden had relied on the availability of Nationwide's deferred compensation benefits. This finding rested primarily on evidence that Darden had not otherwise made adequate financial arrangements for his retirement. With respect to the issue of bargaining power, the court found that Nationwide "received input from its agents" regarding the terms of the agency agreements, but that Nationwide nevertheless "felt free to disregard any advice it received" from them. Pet. App. 21a. Accordingly, the court found "that Darden, and Nationwide agents as a group, lacked sufficient bargaining power to obtain the contractual right to nonforfeitable retirement benefits from Nationwide." *Id.* at 23a.

The district court next determined that the deferred compensation plan—pursuant to which "Nationwide maintained a retirement account for Darden and annually credited to that account a sum based on Darden's earnings from original and renewal fees for insurance policies," Pet. App. 33a—was a "pension plan" under Section 3(2)(A) of ERISA and that his benefits had vested pursuant to Section 203(a). Pet. App. 24a, 31a. However, the district court determined that the extended earnings plan—pursuant to which "Nationwide agreed to pay Darden, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months," *id.* at 34a, was not a pension plan. *Id.* at 5a. Since ERISA's nonforfeiture rule applies only to pension plans, and not to other sorts of employee benefit plans, the court held that the clause in Nationwide's plan providing for the forfeiture of benefits if the agent competes with Nationwide was not invalid with respect to the extended earnings plan.

5. The court of appeals affirmed. Pet. App. 1a-12a. It "agree[d] with the district court's conclusion that Darden was an employee under ERISA," *id.* at 8a; the finding "that the Deferred Compensation Plan represented an ERISA 'pension plan,'" *id.* at 9a; and the finding "that the Extended Earnings Plan did not constitute a pension plan under ERISA," *id.* at 11a. Accordingly, under the court of appeals' judgment, Darden is entitled to the money in his deferred compensation account, but is not entitled to benefits under the extended earnings plan.

In its petition for a writ of certiorari, Nationwide contended that the court of appeals erred by holding that Darden is an employee within the meaning of Section 3(6) of ERISA.

SUMMARY OF ARGUMENT

1. Congress did not regulate all arrangements that provide for retirement or medical benefits. Instead, Congress expressly restricted ERISA's reach to *employee* benefit plans. This Court has made clear that congressional use of the term "employee" in remedial social legislation, like ERISA, must be defined through reference to the common law of agency, applied in light of the remedial purposes of the legislation. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729-730 (1947) (Fair Labor Standards Act); *United States* v. *Silk*, 331 U.S. 704, 712 (1947) (Social Security Act).

2. Consistent with these precedents, the Department of Labor and the Internal Revenue Service have both interpreted "employee" in Section 3(6) primarily with reference to the common law test, but have applied those factors in light of the purposes of the Act. For example, the Department recently determined that the participants in a health care plan were employees of the *clients* of the company that marketed the health care plan. Even though the agreement between the clients and the company stated that the participants were employees of the company marketing the plan, the participants were employees of the clients because they were subject to the control of the clients. Dep't of Labor, Op. Ltr. No. 91-17A (Apr. 5, 1991). Similarly, the IRS successfully argued that professionals could not evade ERISA's minimum participation requirements by "leasing" themselves to their prac-

tices, since under common law principles they were not employees of the leasing company, which did not control the manner in which services were provided. *Professional & Executive Leasing, Inc.* v. *Commissioner*, 89 T.C. 225, 231-235 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988).

The courts of appeals have followed a similar approach tied to common law factors. The Fourth Circuit is in fact alone in its decision to disregard the common law approach in favor of its own novel definition of an "employee." *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553-1555 (D.C. Cir.), cert. denied, 111 S. Ct. 347 (1990); *Penn* v. *Howe-Baker Eng'rs, Inc.*, 893 F.2d 1096, 1102 n.6 (5th Cir. 1990); *Wolcott* v. *Nationwide Mutual Ins. Co.*, 884 F.2d 245, 250 (6th Cir. 1989); *Holt* v. *Winpisinger*, 811 F.2d 1532, 1538 (D.C. Cir. 1987).

3. The test devised by the court of appeals in this case does not conform to congressional intent. It has no basis in the text of the statute and departs from the common law test altogether. It is also unworkable on a practical level. By focusing on factors such as anticipation of benefits, reliance, and relative bargaining power, the test makes "employee" status inherently unclear and subject to change. That, in turn, renders the legal status of pension plans uncertain, since such plans are subject to ERISA's requirements and qualify for its advantages only if they provide retirement income to employees.

The flawed nature of the Fourth Circuit's test is also illustrated by the fact that it led the court to conclude that Darden—the sole proprietor of his own business—is an employee. In contrast, the district court's initial decision applied the proper test and reached the correct result. As the district court found, an individual, such as Darden, who makes money "primarily through [his] own efforts, ingenuity, and good business sense," is an independent contractor, and is therefore excluded from ERISA's coverage. Pet. App. 49a.

ARGUMENT

A PERSON WHO OPERATES HIS OWN INSURANCE BUSINESS PURSUANT TO AN AGREEMENT TO REPRESENT ONE INSURANCE COMPANY ON AN EXCLUSIVE BASIS IS AN "INDEPENDENT CONTRACTOR," NOT AN "EMPLOYEE" OF THAT INSURANCE COMPANY UNDER SECTION 3(6) OF ERISA

ERISA does not cover all plans providing benefits of the sort listed in Section 3(1) and (2) of the Act, 29 U.S.C. 1002(1) and (2). That is, Congress did not say, for example, that any plan providing retirement income or medical benefits is subject to the Act. Instead, Congress limited the coverage of ERISA to *employee* benefit plans: to pension plans to the extent that they provide retirement income to "employees," 29 U.S.C. 1002(2)(A), and to welfare plans to the extent that they provide benefits to "participant[s]," 29 U.S.C. 1002(1), which the Act in turn defines to mean certain "employee[s]" or "former employee[s]," 29 U.S.C. 1002(7).[4] Indeed, Congress provided that, as used in the Act, "pension plan" is a shorthand for "employee pension benefit plan" and "welfare plan" is a shorthand for "employee welfare benefit plan." 29 U.S.C. 1002(2)(A), 1002(1).

A. This Court Has Made Clear That The Term "Employee," As Used In Remedial Social Legislation, Is Defined With Reference To The Common Law Factors Construed As A Whole And In Light Of The Purposes Of The Statute At Issue

Although the term "employee" is a basic component of ERISA, the statutory definition set forth in Section 3(6) of the Act—"any individual employed by an employer"—

[4] The restriction to employees is in line with the purposes of the Act, which is called the *Employee* Retirement Income Security Act and was enacted in part because "employee benefit plans * * * have become an important factor affecting the stability of employment and the successful development of industrial relations." 29 U.S.C. 1001(a).

provides essentially no guidance on its face. However, this "circular" definition, *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir.), cert. denied, 111 S. Ct. 347 (1990), derives meaning from prior judicial construction of the term "employee" in various statutes and this Court's repeated decisions holding that the term should be construed with reference to the factors considered under the common law of agency.[5]

In a recent decision involving the question of employee status under the 1976 Copyright Act, the Court stated that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Community for Creative Non-Violence* (*CCNV*) v. *Reid*, 490 U.S. 730, 739-740 (1989) (citing Federal Employer Liability Act cases).[6] The ultimate question under the common law test is whether "with respect to his physical conduct in the performance of the service," the person "is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1958). This focus on the right to control flows naturally from the original purpose of the common law test, which was to determine whether a party should be held vicariously liable for another person's tortious acts.

In cases involving remedial social legislation, the Court has relied primarily on the factors used to determine whether an individual would be considered a "servant"

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[5] The meaning of "employee" in Section 3(6) is necessarily a matter of federal law. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989), quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) ("we have held that courts are to develop a 'federal common law' of rights and obligations under ERISA-regulated plans").

[6] The Court found further support for its conclusion that reference to the common law test was warranted because the term "scope of employment" in the Copyright Act provision at issue was "a widely used term of art in agency law." 490 U.S. at 740.

for purposes of the common law test, see n.1, *supra*, but has emphasized the need to tailor the application of such factors to further the particular congressional scheme. The Court has concluded that Congress did not intend to confine the definition of "employee" in such statutes to the strict application of common law principles governing vicarious liability. For example, under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, the Court suggested that "many persons" who might not be employees under the common law standard might nevertheless be employees under the FLSA. *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729 (1947).[7] The Court nevertheless considered factors similar to those analyzed under the common law of agency, and the Court's conclusion would in fact appear to be consistent with the common law test. See also *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 258 (1968) (National Labor Relations Act); *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947) (Social Security Act).

In *Rutherford Food*, the issue was whether persons working as butchers in a slaughterhouse were employees entitled to overtime pay, and the Court relied on the fact that "[t]he premises and equipment of [the slaughterhouse] were used for the work"; "[t]he group had no business organization that could or did shift as a unit from one slaughterhouse to another"; and "[t]he managing official of the plant kept close touch on the operation." 331 U.S. at 730. The Court concluded that while "profits to the [butchers] depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor."

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[7] The FLSA is particularly relevant here since the definition of "employee" under that Act—"any individual employed by an employer," see 331 U.S. at 728 n.6 (quoting ch. 676, § 3(e), 52 Stat. 1060)—is identical to the definition of "employee" in Section 3(6) of ERISA.

Ibid.[8] Viewing "the circumstances of the whole activity," the Court held that the butchers were employees rather than independent contractors. *Ibid.*[9]

Thus, while "reject[ing] the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants,'" *United States* v. *Silk*, 331 U.S. 704, 713 (1947), the Court has also repeatedly borrowed factors developed under the common law of agency.[10] Those factors have been applied in a

[8] In this case, in contrast, the district court found that "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money." Pet. App. 49a. The court of appeals did not disagree—it stated that under "traditional common law principles, Darden most probably would not qualify as an employee," *id.* at 39a—but instead departed completely from the factors considered under the common law test.

[9] As illustrated by the cases from the 1940s involving remedial social legislation and the cases cited in *CCNV* v. *Reid*, 490 U.S. at 740, this Court has long construed "employee" in light of the common law of agency and the purposes of the statute at issue. Congress was presumably aware of that practice when it enacted ERISA in 1974. See *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981) ("Congress is 'predominantly a lawyers body' * * * and it is appropriate for us 'to assume that our elected representatives . . . know the law'").

[10] The courts of appeals have similarly rejected application of a strict common law test for determining employee status for purposes of social legislation, while in many instances relying upon a variety of common law factors in fashioning a test. See, *e.g.*, *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382 (3d Cir.) (FLSA), cert. denied, 474 U.S. 919 (1985); *EEOC* v. *Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (ADEA); *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.) (Title VII of the 1964 Civil Rights Act), cert. denied, 459 U.S. 874 (1982); *Clarkson Constr. Co.* v. *OSHRC*, 531 F.2d 451, 457-458 (10th Cir. 1976) (OSHA); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974) (same); cf. *Korea Shipping Corp.* v. *New York Shipping Ass'n*, 880 F.2d 1531, 1535 (2d Cir. 1989) (Title IV of ERISA); *Avis Rent A Car Sys., Inc.* v. *United States*, 503 F.2d 423, 428-430 (2d Cir. 1974) (applying *Silk* and *Bartels*-type analysis in a tax refund action).

manner designed "to accomplish the purposes of the legislation," *id.* at 712, but this Court has never departed entirely from the common law test.[11]

B. The Term "Employee" In Section 3(6) Of ERISA Should Be Defined Primarily With Reference To The Factors Of The Common Law Test, Which Should Be Applied In Light Of The Remedial Purposes Of The Act

As applied to ERISA, this Court's decisions make clear that "employee" should be defined with reference to the

[11] In *Silk*, upon which the court of appeals relied as support for departing from the common law test, Pet. App. 40a, the Court stated that "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation," 331 U.S. at 716—all of which are considered under the common law test, see n.1, *supra*—are important in determining whether an individual is an employee under the Social Security Act. In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), upon which the court of appeals also relied, Pet. App. 40a, the Court departed from the common law test to a greater extent than in any other case. But even there, where the Court determined that the National Labor Relations Board had not erred by determining that certain "newsboys" were employees, the Court noted that "[i]n addition to effectively fixing the compensation, [the publishers] in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work." 322 U.S. at 117-118. It added that the Board had found that the publishers controlled the newsboys by "dictat-[ing] their buying and selling prices, fix[ing] their markets and control[ing] their supply of papers," supervising (and to some extent prescribing) "[t]heir hours of work and their efforts on the job," and furnishing "[m]uch of their sales equipment and advertising materials"—all factors that are relevant under the common law test. *Id.* at 131. Moreover, *Hearst Publications* is questionable authority for the proposition that when Congress uses the word "employee" without providing a specific definition it intends the courts to construe the term without reference to the common law, since Congress amended the National Labor Relations Act (NLRA) following the decision to provide that "any individual having the status of an independent contractor" under the common law test is not an employee under the NLRA. See *NLRB* v. *United Insurance Co.*, 390 U.S. 254, 256 (1968).

common law factors applied in light of the remedial purposes of the statute.[12]

1. a. In its advisory opinions issued with respect to employee status under ERISA, the Department of Labor has endeavored to apply a modified common law test of the sort utilized by this Court in cases involving similar statutes. For instance, in a recent opinion letter addressing whether the inquirer's health plan constituted a "multiple employer welfare arrangement" under ERISA, the Department of Labor wrote that the existence of an employer-employee relationship "will be determined by applying common law principles, taking into account the remedial purposes of ERISA." Dep't of Labor, Op. Ltr. No. 91-17A at 1, 3 (Apr. 5, 1991) (*reprinted at* Reply to Br. in Opp. App. 1a, 4a). The Department continued, echoing the common law test: "consideration must be given to, among other things, whether the person for whom services are being performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also to the details and means by which the result is to be accomplished." *Ibid.*

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[12] ERISA falls squarely within the tradition of remedial social legislation which the courts have construed liberally. As this Court has noted, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374 (1980) (footnotes omitted). Congress enacted ERISA to ensure, among other things, that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whtatever conditions are required * * * —he actually will receive it." *Id.* at 375. See also *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983); *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). "[T]his overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations." *Rettig* v. *PBGC*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984).

In that letter, the Department considered whether persons who worked for companies that subscribed to health care plans marketed by Synesis Service Corporation were employees of Synesis. Even though the agreements between Synesis and its clients referred to the participants in the plans as employees of Synesis, the Department concluded that they were not Synesis employees since the contract further specified that the clients, and not Synesis, had "the sole responsibility for recruiting, hiring, training, evaluating, replacing, supervising, disciplining and firing" the participants. Op. Ltr. 91-17A at 2; Reply to Br. in Opp. App. 2a. The primary reason for the contractual provision reciting that the participants were employees of Synesis appeared to be to evade Section 514(b)(6)(A) of ERISA, 29 U.S.C. 1144(b)(6)(A), which provides that, despite ERISA's broad preemption provision, the States may regulate multiple employer welfare arrangements. See Op. Ltr. 91-17A at 4; Reply to Br. in Opp. App. 5a. Thus, the Department consulted the common law factors—which pointed to the conclusion that the employees were plainly *not* employees of Synesis—and saw no reason to depart from the conclusion that would be drawn from the application of those factors.

Similarly, in response to a request for advice as to whether certain milk vendors were employees under the Act, the Department noted that it did not appear that "the relationship between the milk suppliers and the milk vendors has any of the characteristics generally found in the relationships of employers and employees." Dep't of Labor, Op. Ltr. No. 81-88A, at 4 (July 9, 1981). The Department sent the requester a copy of a recent decision "applying a common law test in determining whether an individual was an employee or an independent contractor," which discussed "some of the factors which may be relevant" to determining employee status under ERISA. *Ibid.* While emphasizing common law factors, however, the Department has stressed that the term "employee" must be "interpreted broadly," and may include persons "who under common-law rules would not be deemed to

be 'employees.'" Dep't of Labor, Op. Ltr. No. 77-75A, at 3 (Sept. 21, 1977).[13]

b. In its administration of Title II of ERISA, the IRS has also applied a test based primarily on common law factors.[14] In *Professional & Executive Leasing, Inc.* v. *Commissioner*, 89 T.C. 225, 230-231 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988), a company devised a scheme to evade the minimum participation rules of 26 U.S.C. 401 and 410 in order to allow professionals to make themselves, but not their staffs, eligible for pension benefits.[15] Under the scheme, the professionals incorporated their practices and entered into service contracts with an agency that set up pension plans for the contracting professionals and then "leased" the professionals back to their professional corporations. The IRS determined that the professionals were not employees of the leasing agency, so that the plan did not qualify for favorable tax treatment. The Tax Court upheld that ruling, and agreed with the IRS's argument that "[t]o determine the existence of an

[13] In the same opinion letter, the Department suggested that one factor—whether a person is an employee under the Federal Insurance Contributions Act (FICA)—was controlling. Dep't of Labor, Op. Ltr. No. 77-75A, at 3-4. However, in view of this Court's decision in *CCNV* v. *Reid*, which concluded that "[n]o one of these factors is determinative," 490 U.S. at 752, the Department now believes that all of the factors must be considered.

[14] This case turns on the meaning of Section 3(6), a matter within Labor's jurisdiction, but its resolution will affect the determination of whether pension rights have vested, a matter primarily within the IRS's jurisdiction, and with respect to which the Secretary of Labor is to follow the IRS's approach. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374.

[15] The minimum participation rules prohibit employers from qualifying a pension plan for the tax benefits available under Title II of ERISA if the plan does not provide benefits to a broad group of employees. The statute provides alternative methods for qualifying under the minimum participation standards; for example, a plan may be qualified if 70% of all employees benefit from the plan. 26 U.S.C. 410(b)(1)(A).

employer-employee relationship we must look to common law concepts." 89 T.C. at 231.[16] As the Tax Court recognized (*id.* at 231 & n.10), the IRS generally has relied on the common law test set out in its regulations under the Federal Insurance Contributions Act (FICA), 26 C.F.R. 31.3121(d)-1(c), to determine employee status.[17]

Thus, both agencies charged with interpreting ERISA have relied primarily on the common law factors in determining whether a person is an employee for coverage purposes. Yet as indicated by this Court's decisions construing analogous social legislation, the focus is not strictly on "control" but on all of the factors considered as a whole. Especially in close cases, the common law test must be applied with reference to Congress's purposes in enacting ERISA.[18]

2. Other than the court below, all of the courts of appeals have looked primarily to the common law test to determine who is an "employee" under Section 3(6) of ERISA. In *Wolcott* v. *Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250 (1989), the Sixth Circuit expressly re-

[16] See also *Burnetta* v. *Commissioner*, 68 T.C. 387, 397 (1977) ("[i]n determining whether or not an individual is an 'employee' for purposes of section 401, we must look to the common law concepts used in making such a determination"); Rev. Rul. 75-35, 1975-1 C.B. 131 (where a doctor formed a professional corporation with himself as the sole employee and a service corporation that employed his staff, the staff members were employees of the professional corporation for the purposes of ERISA's minimum participation requirements). Congress has recently enacted a special provision, 26 U.S.C. 414(n), governing employee leasing.

[17] The IRS elaborated on that regulation, and on the common law test, in Rev. Rul. 87-41, 1987-1 C.B. 296. The Ruling sets out 20 factors to be used in determining whether a person is an employee.

[18] For example, in a case such as the one involving the leasing of professional employees, the IRS would properly look skeptically on arrangements designed to mirror the appearance but not the reality of an employer-employee relationship under the common law. See, *e.g.*, *Holt* v. *Winpisinger*, 811 F.2d 1532, 1534 (D.C. Cir. 1987) (clerical worker paid like, and listed as, independent contractor).

jected the approach taken by the Fourth Circuit in this case, and concluded that "the better reasoned position on [the] meaning of the term 'employee' is set forth in *Holt* [v. *Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987)]." Accord *Plazzo* v. *Nationwide Mut. Ins. Co.*, 892 F.2d 79 (Table) (6th Cir. 1989) (applying common law principles to find that a Nationwide agent was not an "employee" under ERISA), cert. denied, 111 S. Ct. 370 (1990).

In *Holt*, the District of Columbia Circuit held that "one must look to the common-law rules of agency to determine employee status" under ERISA. 811 F.2d at 1538. Furthermore, in *Mayeske*, 905 F.2d at 1553-1555, the D.C. Circuit affirmed its reliance on common law agency principles, noting that such reliance was particularly appropriate in light of this Court's decision in *CCNV* v. *Reid*, where the Court's findings with respect to whether a sculptor was an employee of the organization that commissioned his work "mirrored the Restatement (Second) test." *Id.* at 1554 n.8. Similarly, the Fifth Circuit recently expressed its disagreement with the Fourth Circuit's test, holding that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency." *Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1102 n.6 (1990).[19]

Thus, the other courts of appeals have properly emphasized reliance on the conventional common law test set forth in Section 220 of the Restatement. See *Mayeske*,

[19] The Seventh and Eighth Circuits have applied the common law test in cases arising under ERISA, but appear to have done so in order to determine the intended coverage of a particular plan, rather than to determine what Congress meant in Section 3(6). See *Short* v. *Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson* v. *Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle* v. *Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

905 F.2d at 1554-1555; *Penn*, 898 F.2d at 1102-1103.[20] But while those courts have avoided the erroneous path taken by the court below, it is unclear whether they are giving appropriate weight to this Court's decisions involving remedial social legislation—such as *Rutherford Food*, *Silk*, and *Bartels*—in cases where a rigid application of the common law test may be inconsistent with congressional intent.[21]

[20] To our knowledge, no court has strictly applied the common law test in interpreting ERISA. That is, no court has expressly restricted its analysis to whether the "employer" had the right to control the "employee" such that it would be proper to hold the "employer" vicariously liable for torts committed by the "employee" while acting within the scope of his duties.

[21] In *Penn*, the Fifth Circuit relied almost exclusively on this Court's decision in *CCNV* v. *Reid*, which involved the Copyright Act rather than remedial social legislation. See 898 F.2d at 1102-1103. That focus may have led it to an erroneous result. The court concluded that an individual who had been an employee of an engineering company for nine years and then left the company for a few months returned to the company as an independent contractor, and therefore his pension rights did not vest (as they did for all "employees" pursuant to 26 U.S.C. 411(d)(3)) when the company terminated its pension plan. The court reached that result even though upon his return the individual did the same work (apparently at the same desk and for the same supervisors) that he did while he was unquestionably an employee, and even though he did that work at the engineering company's offices with the company's tools. *Id.* at 1098, 1103. The court emphasized as an especially "significant factor" an agreement that the individual signed upon his return that designated him as an independent contractor. *Id.* at 1103 & n.9. The decision was probably erroneous under the common law test. See, *e.g.*, *Wright* v. *United States*, 537 F. Supp. 568, 570 (N.D. Ill. 1982) ("[t]he self-serving characterizations of the parties are irrelevant"); *Singer* v. *Star*, 510 So. 2d 637, 640 (Fla. Dist. Ct. App. 1987) (reversing a grant of summary judgment in favor of a newspaper alleged to be responsible for the torts of a person who sold subscriptions, where the trial court relied heavily on a contract designating the person as an independent contractor). In any event, proper consideration of the purposes of ERISA would likely have tipped the scales in favor of the individual claiming to be an employee, since ERISA's vesting provisions are central to the statute's

C. The Court Of Appeals Erred By Abandoning The Common Law Test And Concluding That Darden Was An Employee Of Nationwide

1. a. In this case, the Fourth Circuit said that "the common-law test for the relationship of master and servant is not the appropriate standard for application," Pet. App. 40a, and the test it devised bears no relation at all to the test set out in Section 220 of the Second Restatement of Agency. To the contrary, the Fourth Circuit's test is drawn entirely from the congressional statement of purpose set out in Section 2 of ERISA. While in our view such factors may be influential in a close case, they do not by themselves constitute a definition of "employee." To the contrary, as this Court has repeatedly recognized, when Congress uses the term with little or no elaboration, it does so against the background of the common law meaning of the term. See *CCNV* v. *Reid*, 490 U.S. at 739-740. The Fourth Circuit's test accordingly conflicts with the principles of decisions adopted by this Court in those cases.

b. The Fourth Circuit's test also has little apparent connection to the ordinary meaning of the word "employee." That is, the factors of the common law test—which show whether a person is subject to the control of another in performing his tasks—plainly relate to whether a person is an employee in common parlance. But no ordinary definition of "employee" would focus on the anticipation of retirement benefits, reliance on those benefits, and relative bargaining power.[22]

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remedial scheme. See J. Langbein & B. Wolk, *Pension and Employee Benefit Law* 82 (1990). That would be particularly so if, for example, there was evidence that the company designated an individual as an independent contractor solely for the purpose of preventing his pension rights from vesting when the plan was terminated.

[22] In fact, those matters seem to have little to do with whether a person is an "employee." First, whether a person who is eligible for benefits under a program "anticipated" the receipt of benefits

c. The Fourth Circuit's test could not have been intended by Congress because it creates an unacceptable degree of uncertainty, since employment status would depend in large part on what the individual anticipated, whether he relied on the retirement program at issue, and whether he had bargaining power individually or collectively. That uncertainty would prevent employers from determining whether a benefit plan was subject to ERISA, even though, for example, an insurance company establishing a plan for agents comparable to Nationwide's deferred compensation plan would reasonably want to know, at the outset, whether it was required to comply with ERISA's funding, reporting, and disclosure requirements, and whether it was entitled to the favorable tax treatment accorded qualifying plans.

In applying the Fourth Circuit's test and deciding that Darden was an employee, the district court relied heavily on the fact that Darden had saved only about $18,000 through other retirement programs; that fewer than half of the Nationwide agents like Darden participated in a Keogh Plan or had an individual retirement account; and that Nationwide, by and large, had not followed the suggestions of an advisory council of insurance agents. Pet. App. 18a-23a. Plainly, under the Fourth Circuit's standard Nationwide could not have known in advance whether its plan was a "pension plan" under Section 3(2)(A) of ERISA—which states that a "pension plan" is a plan that provides retirement income to *employees* or results in a deferral of income by *employees*. In fact, Nationwide's plan would presumably cease to be a pension plan under the Fourth Circuit's approach if, over

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is not particularly helpful in distinguishing employees from others who perform service. Second, it is not clear why a person who participates in a retirement benefits program is an employee while another person, who does the exact same work but prepares for retirement through his own investments, is not. Third, persons who negotiate through unions may have considerable bargaining power, but that does not make them independent contractors.

the next few years, a large number of Nationwide agents decide to participate in its Keogh plan and the suggestions of the advisory council are generally implemented. The legal status of a plan should not depend on the occurrence of such events.

2. a. In our view, the district court approached this case properly and reached the correct result in its initial decision. As to approach, the district court considered the various factors set out in the common law test but, relying on this Court's decisions in *Silk* and *United Insurance Co.*, assessed those factors in light of the "total factual context." Pet. App. 50a. As to result, although it is clear that Darden relied on Nationwide to a significant degree and represented that company exclusively for 20 years, it is also clear that he was an independent contractor. Darden paid his own business expenses and was free to incorporate his business, to set his own hours, to solicit business as he saw fit, and to hire and fire his own employees. *Id.* at 49a. He was compensated through commissions, reported his own income, and paid taxes as an independent businessman. *Ibid.* In sum, "it was primarily through [Darden's] own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide." *Ibid.*[23]

b. This construction of "employee" also conforms to congressional use of that term in other contexts. In FICA legislation, Congress has made clear that it understands that insurance agents are often not "employees" under common law principles. Congress provided that

[23] In *Wolcott*, the Sixth Circuit specifically disagreed with the approach taken by the court below, and concluded that a Nationwide insurance agent like Darden was an independent contractor. 884 F 2d at 250-251. Like the district court in this case, the Sixth Circuit held that the agent was an independent contractor because he "hired his own employees and exercised managerial skill in the operation of his business," as shown by the fact that he operated his own office, managed his own staff, was paid on a commission basis, and reported his income to the IRS as a self-employed individual. *Id.* at 251.

"employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee," 26 U.S.C. 3121(d)(2), and added that the term embraces certain others, including "a full-time life insurance salesman," 26 U.S.C. 3121(d)(3)(B). But even in extending FICA's reach, Congress made clear that it did not intend it to cover persons like Darden even if they sold only life insurance, since Congress further provided that such salesmen are not employees for FICA purposes if they have "a substantial investment in facilities used in connection with the performances" of their services, 26 U.S.C. 3121(d)(3), and Darden "owned the building housing his agency's offices and the furniture used there, as well as an automobile maintained for business purposes," Pet. App. 39a.

c. This result is also consistent with the purposes of ERISA. ERISA does prohibit clauses such as Nationwide's forfeiture provision, see Rev. Rul. 85-31, 1985-1 C.B. 153; *Hummell* v. *S.E. Rycoff & Co.*, 634 F.2d 446, 449-450 (9th Cir. 1980), but forfeiture clauses were made invalid in order to protect "employees" from the loss of vested benefits as a sanction for disloyal conduct. See H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974); 120 Cong. Rec. 29,197 (1974). Nothing in the Act or its legislative history suggests that Congress intended to prohibit forfeiture provisions in plans that provide benefits to persons who are independent contractors running their own businesses, rather than employees. And nothing about the facts of this case suggests that Nationwide attempted to disguise insurance agents like Darden as independent contractors in order to evade ERISA's requirements. In such instances, where the plan in question can fairly be regarded as part of a transaction between business entities, the protection of ERISA's nonforfeitability rule should not be extended to cover independent contractors.

If an agent such as Darden is an employee, then all retailers operating under the provisions of an exclusive dealing arrangement—including, for example, many automobile dealership owners and other franchisees—are potentially employees. Such a result would stretch the common law test far beyond its limits and is not justified by an analysis of the relevant ERISA policies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 90-1802

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 22, 1991
CERTIORARI GRANTED OCTOBER 15, 1991

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* The opinions and judgments of the court of appeals, and the opinions and judgments of the district court are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

Robert T. Darden, *Plaintiff*
v.

Nationwide Mutual Insurance Company, et al.,
Defendants

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/08/83	COMPLAINT
11/28/83	MOTION & ORDER FOR EXTENTION [sic] OF TIME to & including 12/28/83 to respond to complaint allowed by clerk.
12/27/83	ANSWER—by deft with Motion to Dismiss incl. in answer.
02/02/84	ORDER—Judge Fox—Motion to dismiss for lack of subject matter jurisdiction DENIED without prejudice.
10/01/84	DEFTS' MOTION FOR SUMMARY JUDGMENT. MEMORANDUM IN SUPPORT OF DEFTS' MOTION FOR SUMMARY JUDGMENT. DEPOSITIONS OF: WILLIAM R. MAYO, ELTON PARKER, & BERNARD HARRIS PARKER.

10/17/84 PTFF'S RESPONSE TO DEFTS' MOTION FOR SUMMARY JUDGMENT & DEFTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(1).

10/29/84 DEFTS' RESPONE [sic] TO PTFF'S MOTION FOR SUMMARY JUDGMENT.

12/21/84 Case referred to Mag. for M&R. Case file to Mag. McCotter.

03/08/85 MEMORANDUM & RECOMMENDATION—Mag. McCotter—ptff's motion for summary judgment should be granted

04/05/85 DEFENDANTS' OBJECTIONS TO MAGISTRATE'S MEMORANDUM AND RECOMMENDATIONS—by defts. w/affidavits and exh. attchd.

04/26/85 PTFF'S RESPONSE TO DEFTS' OBJECTIONS TO MAGISTRATE'S MEMORANDUM & RECOMMENDATIONS.

05/23/85 ORDER—Judge Boyle—defts' motion for summary judgment allowed.

05/23/85 JUDGMENT ON DECISION BY THE COURT—per order of Judge Boyle filed 5-23-85, defts motion for summary judgment is ALLOWED.

06/18/85 NOTICE OF APPEAL by ptff.

06/20/85 NOTICE OF APPELLATE ACTION to 4th Circuit.

07/17/86 PUBLISHED OPINION—4TH CIRCUIT—VACATED AND REMANDED.

09/26/86 MANDATE—FOURTH CIRCUIT—VACATED AND REMANDED. Rec'd. Record on Appeal Case reopened.

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PTFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.
DEFT'S RESPONSES TO PTFF'S INTERROGATORIES in support of ptff's motion for summary judgment, with index to documents produced by deft. pursuant to request for production.
DEPOSITION OF HERB BOWMAN
DEPOSITION OF MIKE COLLVER
DEPOSITION OF KEN BONVALLET

03/24/87 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

03/24/87 MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

04/10/87 DEPOSITION—OF ROBERT T. DARDEN TAKEN ON 2-19-87

04/13/87 PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

04/13/87 MEMORANDUM OF DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

04/22/87 MEMORANDUM OF DEFENDANTS IN REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

10/09/87 DEFENDANTS' SUPPLEMENTAL MEMORANDUM WITH RESPECT TO CROSS MOTIONS FOR SUMMARY JUDGMENT

06/22/88 ORDER—Judge Boyle—The court finds that the question of whether Darden is an "employee" under ERISA is still unsuitable for summary judgment disposition; and the parties' cross motion for summary judgment on that ground are DENIED. The court finds that the question of whether the DCIC plan is a "pension plant" [sic] under ERISA is also inappropriate for summary judgment disposition and accordingly motions made on this ground are DENIED. The case will be restored to the trial calendar and the trial will be limited to the questions of whether DARDEN is an "employee" and whether the DCIC plan is a "pension plan" under the factors as set forth in the Court of Appeals opinion. All motions for summary judgment are DENIED. The clerk is directed to replace this action on the trial calendar.

07/29/88 ORDER—Judge Boyle—Defts motion to strike pltf's jury demand is GRANTED.

09/19/88 PLTF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—w/c.s.
DEFS'. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—w/c.s.

04/05/89 PLAINTIFF AND DEFENDANTS' STIPULATIONS AS TO FINDINGS OF FACT

MEMORANDUM OPINION—Judge Boyle—The Court concludes that the Deferred Compensation Plan is subject to the nonforfeiture provisions of § 1053(a). Plaintiff Darden is entitled to receive his accrued deferred compensation benefits when he attins [sic] the age of 60.

07/05/89 JUDGMENT IN A CIVIL CASE—Pursuant to the Court's order filed 7-5-89, the court concludes that the Deferred Compensation Plan is subject to the nonforfeiture provisions of § 1053(a), and Darden is entitled to receive his accrued deferred compensaiton [sic] beneifts [sic] when he attains the age of 60.

07/12/89 NOTICE OF APPEAL w/cs—by deft. attys

07/24/89 NOTICE OF CROSS-APPEAL w/cs—by pltf. atty.

08/08/89 MAILED NOTICES OF APPEAL TO US COURT OF APPEALS including filed copies of notices, cc of orders appealed from, index and trans. ltr. CC of filed notices to Judge Boyle. CC to pltf. and deft.

01/01/91 PUBLISHED OPINION OF THE US COURT OF APPEALS—Affirmed.

03/01/91 ORDER It is ordered that the petition for rehearing and suggestion for rehearing in [sic] banc are denied. John Greacen, Clerk U.S. Court of Appeals., lc Judge Boyle. (ent. 3-1-91) ms.

03/04/91 JUDGMENT U.S. COURT OF APPEALS—On consideration whereof, it is now her [sic] ordered and adjudged by thsi [sic] court that the judgment of the said District Court appealed from, in theses [sic] causes be, and the same is hereby affirmed.

ORDER U.S. COURT OF APPEALS—The court denied appellee/cross appellant's bill of costs.

CASE FILE RECEIVED FROM U.S. COURT OF APPEALS CONSISTING OF 5 VOLUMES.

NOTICE OF FILING OF PETITION FOR CERTIORARI IN THIS CASE HAS BEEN RECEIVED FROM THE SUPREME COURT.

07/12/91 NOTICE OF FILING OF PETITION FOR CERTIORARI IN THIS CASE HAS BEEN RECEIVED FROM THE Supreme Court.

10/21/91 ORDER from the Supreme Court (90-1953) stating petition for a writ of certiorari is DENIED.

10/21/91 ORDER from the Supreme Court (90-1802) stating petition for a writ of certiorari is GRANTED.

AGENT'S AGREEMENT

PREFACE

It is the intent of this Agreement to define the conditions governing the business relationship between the parties involved. Only if both parties understand their duties and responsibilities can a mutually satisfactory relationship be established and maintained. The overall objectives of this Agreement are:

1. To provide a relationship which will result in the best possible service to the customer.
2. To assist the Agent in establishing and maintaining a growing agency which is profitable to both the Agent and the Companies.
3. To maintain the Companies' financial strength at the level necessary to protect the policyholders' interests.

AGENCY APPOINTMENT

Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company, collectively referred to in this Agreement as "we", "us" "Nationwide" or the "the Companies", insurance corporations organized and existing under the laws of the State of Ohio with their principal offices located at Columbus, Ohio, appoint

R. T. Darden
name

referred to in this Agreement as "you" or the "Agent" of 2902 Highway 87 N., Spring Lake, N.C. Cumberland
Street-Route City State County

as an agent to represent the Companies in North Carolina, while properly licensed so to act in accordance with the provisions of this Agreement. This Agreement is to become effective
January 1 , 1977.

1. Independent Contractor. The parties agree that the purpose of this Agreement will be best served by your acting as an independent contractor. Therefore, it is agreed that you are an independent contractor for all purposes. As an independent contractor, you have the right to exercise independent judgment as to time, place, and manner of soliciting insurance, servicing policyholders, and otherwise carrying out the provisions of this Agreement. Insurance being a closely regulated business, it is understood that it will be necessary for us to provide you with certain manuals, forms, records, and such other materials and supplies as are necessary in the conduct of an insurance business. All such property furnished to you by the Companies or on behalf of the Companies shall remain the property of the Companies and be returned to them in good condition upon any cancellation of this Agreement. We may offer to you, from time to time, training, counsel, and guidance based upon our accumulated experience in the sale and servicing of business. However, it is understood that you may reject or accept such offers at your discretion.

2. Expenses. As an independent contractor, you will pay all expenses in connection with your Nationwide insurance agency. You will not incur any indebtedness on behalf of us in connection with expenses resulting from your Nationwide agency. As an independent contractor, you will be responsible for securing and keeping in effect any required license to represent us as an agent. You agree not to solicit any lines of insurance unless you have the required license authorizing you to do so.

3. Licenses. As an independent contractor, you will be responsible for securing and keeping in effect any required license to represent us as an agent. You agree not to solicit any lines of insurance unless you have the required license authorizing you to do so.

   Set forth below are the types of licenses you hold and the date acquired:

Casualty	September 1 , 1960
Health and Accident	September 1 , 1960
Fire and Inland Marine	September 1 , 1960
Life	September 1 , 1960

4. Exclusive Representation. It is agreed and understood that you will represent us exclusively in the sale and service of insurance. Such exclusive representation shall mean that you will *not solicit or write policies* of insurance in companies other than those parties to this Agreement, either directly or indirectly, without the written consent of these Companies. It is not intended that the incidental use of voluntary or statutory state or federal insurance plans or other similar agreements, shall be a violation of this clause.

5. General Conduct and Representation. You will maintain a good reputation in the community which you serve and will direct your efforts in the field of insurance toward advancing the business and interest of the Companies to the best of your ability. In the conduct of your business, you will comply with all applicable insurance laws and regulations.

6. Company Funds. All funds coming into your possession from customers as premiums or considerations for insurance policies issued by the Companies are funds of the Companies received by you in a fiduciary capacity and shall be immediately remitted to us. If any such funds are not remitted to us, we shall have a first

lien on all compensation due or which may become due you to the extent of such funds. Each of the Companies is authorized to deduct the entire amount of such funds due, either before or after the cancellation of the Agreement, from any compensation due you.

7. Compensation. Any compensation due you under this Agreement from any of the Companies, may be paid, to you, on their behalf, by any of the other Companies. For all services rendered under this Agreement by you, you shall be compensated solely in accordance with the General Conditions and the Schedules of each Company, attached hereto and made a part hereof except for such additional compensation payable to you under paragraph 11.

   It is agreed that we will pay you any and all original and renewal commissions earned by you, but not credited to your account at the time of entering into this Agreement, on business written by you while employed by us under our Agent's Employment Agreement. It is understood, however, that we may deduct from any compensation due you under this Agreement any commissions previously credited to your account while an employee agent, which subsequently become unearned as a result of the termination or lapse of any policy or coverage.

   Should any Company desire to amend its General Conditions or Schedules, notification in writing of such amendment shall be given to you prior to its effective date, and shall become a part of this contract on its effective date.

8. Overpayment of Compensation. Any compensation paid to you for premiums later returned or credited to the customer or any other overpayment of compensation shall be a debt due us from you. In addition to all other rights available to us as a creditor, we shall

have the right to deduct such compensation or overpayment from any future compensation due you.

9. Cancellation. This Agreement shall continue from its effective date until the end of the current year and shall be automatically renewed thereafter from year to year unless sooner cancelled.

   This Agreement shall automatically cancel upon the date your license to act as an agent for the Companies is revoked or cancelled, or upon your death, or normal retirement at age sixty-five (65). Further, due to the personal nature of our relationship you or the Companies have the right to cancel this Agreement at any time after written notice has been delivered to the other or mailed to the other's last known address. It is understood that the Agent shall have access to the Agents Administration Review Board, and its procedures, as it may exist from time to time.

10. Service to Customer Upon Cancellation. Upon cancellation of this Agreement, it is understood that the Companies retain the right to continue to provide insurance services to any and all customers and to continue to solicit such customers for additional business.

11. Agent's Security Compensation.

    a. Computation of Deferred Compensation Incentive Credits.

       For each full calendar year you act as an agent for the Companies, beginning in the year you complete your fifth year as an agent with the Companies, until you are age sixty-five (65), the Companies will credit to your account, as Deferred Compensation Incentive Credits, the following percentage of your original and renewal service fee earnings, including earnings from Heritage Securities, Inc., but excluding earnings from JUA's, reinsurance facilities, AIP's, and line 19 auto business.

3% of such earnings from $10,000 to $14,999.99 inclusive

6% of such earnings from $15,000 to $19,999.99 inclusive

10% of such earnings from $20,000 to $24,999.99 inclusive

15% of such earnings in excess of $24,999.99

b. Extended Earnings Payable Upon Qualified Cancellation of this Agreement.

Upon completion of your fifth year of service with the Companies as an agent, the Companies will pay to you as Extended Earnings, upon qualified cancellation of this Agreement, an amount equal to the renewal service fees paid to you by each Company for the last full twelve (12) calendar months immediately preceding such termination, subject to the following exceptions:

(1) Renewal service fees earned from JUA's and state AIP's, shall be excluded.

(2) For purposes of extended earnings renewal service fees shall be reduced by 50% on reinsurance facility and line 19 auto business.

(3) Extended earnings on Nationwide General business shall be calculated at 70% of the last 12 months total compensation paid to you on such business.

c. Amounts Payable Upon Qualified Cancellation

(1) If you live until retirement, you will receive your Extended Earnings, provided you have completed five years of service with the Companies as an agent. In addition, you will receive Deferred Compensation Incentive Credits in ac-

cordance with the provisions outlined in paragraph 11-c(3) and 11-d(2).

(2) If you die or become totally and permanently disabled which results in the cancellation of Agreement, provided that you have completed five years of service with the Companies as an agent, you or your beneficiary, or the estate of your beneficiary, will receive your Extended Earnings and 100% of your accumulated Deferred Compensation Incentive Credits.

(3) If at the time this Agreement is cancelled you have completed at least five years of service with the Companies as an agent, you will receive the Extended Earnings. Deferred Compensation Incentive Credits will be paid to you in accordance with the following schedule and the provisions of paragraph 11-d(2):

(a) 50% of Benefit Payable—When age plus length of service as agent equals the sum of 45.

(b) 10% Additional Benefit Payable for each year of service after the sum of 45 as defined in paragraph (a) above is attained, subject to a maximum, under (a) and (b), of 100% of such benefit.

d. Provisions for Payment

After deducting any amount paid to you under this paragraph for cancellation or termination of any prior Agreement, or as extended renewal service fees under any former agreement, or any amounts due the Companies from you, the Companies will pay to you, or should you not survive, your beneficiary or the estate of your beneficiary:

(1) Your Extended Earnings divided into three (3) equal parts as follows:

Commencing within sixty (60) days following qualified cancellation of this Agreement:

The first part shall be payable in twelve (12) equal monthly installments, each monthly installment after the first on the first day of subsequent consecutive months.

The remaining parts shall be paid in equal annual installments, the first annual installment payable thirty (30) days after payment of the last monthly installment and each other annual installment thereafter on the anniversary of that date until paid. At your election prior to your cancellation, such annual installments may be made in equal monthly payments.

(2) The amount of Deferred Compensation Incentive Credits to which you are entitled payable in three (3) equal parts as follows:

Commencing sixty (60) days after your death or total and permanent disability which results in the cancellation of this Agreement, or sixty (60) days after qualified cancellation of this Agreement.

It is understood that in the event such payments would commence prior to age 60, for reasons other than death or total and permanent disability, such payments shall be reduced to the percentages shown in the following table:

Age At Which Benefit Payments Commence	Percent of Accrued Benefits To be Paid
60	100.00%
59	94.34%
58	89.00%
57	83.96%
56	79.21%
55	74.73%
54	70.50%
53	66.51%
52	62.74%
51	59.19%
50	55.84%
Under 50	None

These sums shall be payable as outlined in d(1) above.

(3) Election for Different Payment.

At your written election, received by the Companies prior to the time of cancellation of this Agreement the Companies will agree to make payments under one of the following methods. Amounts payable as Deferred Compensation Incentive Credits, regardless of election, are not payable prior to your reaching age fifty (50) except in the case of death or total and permanent disability.

(a) To make payments in not less than three (3) nor more than ten (10) equal parts.

Commencing within sixty (60) days after qualified cancellation or such other later date as provided by the election and the terms of this

Agreement, and the parts shall be payable as in d-(1) above.

(b) To pay to you the amounts payable in accordance with paragraph 11, under one of the following three forms of annuity benefits. Such benefits to be determined as actuarial equivalent amounts in accordance with such interest rates and mortality tables as adopted by the Companies for this purpose.

1. Life Annuity—No Death Benefit

2. Life Annuity—Installment Refund, or

3. Life Annuity—Joint and Survivorship

Payments shall commence within sixty (60) days after qualified cancellation or such other later date as provided by the election and the terms of this Agreement.

(c) To divide the amounts payable to you as you elect, paying part in equal annual installments, not less than three (3) nor more than ten (10), with the balance payable under subparagraph (b) above.

The amount payable as equal annual installments shall be paid as provided in subparagraph (a) and the balance as in subparagraph (b).

(4) Payment in Event of Employment.

If this Agreement is cancelled as a result of your employment by the Companies, payments to you shall be deferred until your separation from the Companies, death or total and permanent disability. At that time, payment shall commence as provided by this paragraph 11 as if employment had not intervened.

e. Qualified Cancellation.

Unless you have induced or attempted to induce, either directly or indirectly, policyholders to lapse, cancel, or replace any insurance contract in force with the Companies, the cancellation of this Agreement shall be a qualified cancellation for the purpose of this Agreement.

f. Cessation of Agent's Security Compensation.

All liability of the Companies for Agent's Security Compensation provided for in paragraph 11 and its subparagraphs shall cease and terminate in the event any one or more of the following shall occur:

(1) You either directly or indirectly, by and for yourself or as an agent for another, or through others as their agent, engage in or be licensed as an agent, solicitor, representative or broker or in anyway be connected with the fire, casualty, health, or life insurance business, within one year following cancellation within a 25 mile radius of your business location at that time; or

(2) You fail to return in good condition, within ten days, all materials, records, and supplies furnished to you by the Companies during the course of this Agreement, together with any copies thereof; or

(3) After cancellation of this Agreement, you directly or indirectly induce, attempt to induce, or assist anyone else in inducing or attempting to induce policyholders to lapse, cancel, or replace any insurance contract in force with the Companies; furnish any other person or organization with the name of any policyholder of the Companies so as to facilitate the solicitation by others of any policyholder for insurance or for any other purpose.

g. The Agent's Security Compensation is intended to be in lieu of the compensation and/or benefits awarded by any state statute or regulation. If you elect any benefits of any such statute or regulation then the amount of such benefits so received shall be deducted from the benefits due you under paragraph 11. If the exact amounts of any such statutory or regulatory benefits are known at the time of the cancellation of this agreement, then this deduction shall be immediately made and the balance of such benefits under paragraph 11 shall commence as provided for under the provision of paragraph 11. If the exact amount of such statutory or regulatory benefits are not known at the time of the cancellation of this agreement, then the payment of any benefits under paragraph 11 shall be deferred until such time as the amount of such statutory or regulatory benefits becomes known.

h. Amendments and Termination.

The Companies hope and expect to continue the Agent's Security Compensation Plan indefinitely, and every effort has been made to meet future conditions. In order to protect you and the Companies against unforeseen conditions however, the right to amend or terminate this plan is necessarily reserved by the the [sic] Companies. The Companies may terminate this plan by notification, at least sixty (60) days prior to such termination, in writing. No change in the Plan or termination however can alter or modify rights or benefits received or granted prior to such change or termination.

12. Agent's Activities After Cancellation. (Applicable only to agents entering an independent contractor's agreement for the first time on and after July 1, 1969.)

You agree that if the Agreement is cancelled within a period of five years from the date of your first

contract as an agent with the Company, you will not, either directly or indirectly, by and for yourself or as agent for another or through others as their agent, engage in or be licensed as an agent, solicitor, representative, or broker or in any way be connected with the fire, casualty, health, or life insurance business, within a 25 mile radius of your last business location for a period of one year from the date of the voluntary or involuntary cancellation of this Agreement or should we find it necessary by legal action to enjoin you from competing with us, one year after the date such injunction is obtained.

In any jurisdiction where a covenant similar to that appearing above is held to be invalid either by statute or by judicial decision, you agree upon cancellation of this Agreement you shall thereafter refrain from further solicitation or servicing of policyholders of the Companies and from interfering in any way for a period of one year with existing policies and policyholders in the geographical area described above.

In the event that we are successful in any suit or proceeding brought or instituted by us to enforce any of the provisions of this Agreement or on account of any damages sustained by us by reason of the violation by you of the terms and/or provisions of the Agreement, you agree to pay to us such reasonable attorneys' fees as are permitted by statute and fixed by the court.

13. Agent Number. For the benefit of the Companies and the agent, a number is assigned to each agent to facilitate more efficient use of the Companies computer system. This number is the property of the Companies and may be reassigned for identification within that system. Your name will be printed for your benefit on billings and materials received by our policyholders. If this agreement is cancelled, your name will be re-

moved as soon as possible, but you acknowledge that occasional error may cause it to continue to be printed.

14. Pricing, Products, Rules, and Regulations. The insurance business being subject to changing laws, regulations, and conditions, it is understood and agreed that each Company will prescribe rules, regulations, prices, and terms under which it will insure risks, and each Company retains the right to change, alter or amend such rules, regulations, prices, and terms, including the right to limit, restrict, or discontinue entirely the acceptance or writing of any policies, coverages, line or kinds of insurance, at any time it deems it advisable to do so, and without notice to or consent of the Agent, and any such change, alteration, amendment or limitation shall become effective on the date specified by the Company.

15. Authorization to Direct Bill. The agent and the Companies agree that it is to their mutual benefit for the Companies to bill the policyholders directly. The agent hereby gives the Companies permission to use his name on those billings and for use of his name for a reasonable period following the cancellation of his agreement.

16. Extent of Authority. You will obligate us only to the extent authorized by the rules and regulations set forth by us from time to time, or as may be authorized in writing by an officer of the Companies.

17. Amendments or Modifications. Except as otherwise provided herein, this Agreement may be changed, altered or modified only in writing signed by you and an officer of the Companies.

18. Assignment of Agreement. The Companies rely upon your particular personal abilities in carrying out your obligations under this Agreement, therefore, no assignment of your rights, responsibilities, or any sums

due you under this Agreement shall be made without prior written consent signed by an officer of the Companies.

19. Agreement Defined, Prior Agreements Superseded. Whenever used in this Agreement, the term "Agreement" shall mean any contract in writing captioned "Standard Agent's Agreement", "Master Agent's Agreement", "Agents Employment Agreement" or "Corporate Agency Agreement" between you and the Companies executing this Agreement. The execution and delivery of this Agreement shall supersede and take the place of any prior Agreement, provided that the execution and delivery of this Agreement shall not affect your obligation to pay any money due the Companies from you under the provisions of any other agreement, written or oral, nor shall the execution of this Agreement nullify any negotiated compensation agreement, differing from the schedules of compensation attached to former agreements, entered into between you and the Companies on cases written prior to the execution of this agreement.

20. Severability. If any clause or part of this Agreement shall be held invalid for any reason, then such invalidity shall not affect any part of this Agreement and the parts thereof not invalid shall remain in full force and effect.

21. Legal Action Under This Agreement. It is agreed that no action, suit, proceeding at law or in equity shall be brought under this contract unless it is commenced and process is served within three years after the cause of action for which suit is brought. If the limitations set forth in this paragraph are prohibited by the statutes of the state in which this Agreement is issued, then these limitations shall be deemed amended to agree with the minimum period of limitation permitted by such statutes.

IN WITNESS WHEREOF, the Agent has signed his name and the Companies have caused their corporate names to be affixed by their duly authorized representative to duplicate copies hereof.

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company

By /s/ Signature illegible 12/2/76
For the Companies Date

/s/ Robert T. Darden 12/2/76
Agent Date

Termination Letter

NATIONWIDE
INSURANCE

October 29, 1980

Mr. R. T. Darden
Box 526
102 Highway 210
Spring Lake, North Carolina 28390

Re: Notice of Cancellation of Agent's Agreement
Nationwide Mutual Insurance Company
Nationwide Life Insurance Company
Nationwide Fire Insurance Company

Dear Mr. Darden:

It is with regret that we find it necessary to cancel your Agent's Agreement.

Notice has been mailed to the State Insurance Department cancelling your licenses to represent the Nationwide Insurance Companies as an Agent, effective November 13, 1980.

If at any time you are called upon to render any services to our policyholders, please direct them to our District Sales Manager, Billy G. Kiker, P.O. Drawer 40137, 2551 Ravenhill Road, Fayetteville, North Carolina 28302. If you have not already done so, please return all Nationwide manuals, portfolios, reference guides, policies and other supplies and the policyholder files to the District Sales Manager as soon as possible.

I am very sorry that things have not worked out as we both would have desired. May I convey my best wishes and the best wishes of the Companies to you in your future endeavors.

Sincerely,

/s/ William R. Mayo

William R. Mayo
Regional Sales Manager

WRM/bsm

cc: B. H. Parker, Regional Vice President—Regional Manager
C. S. Byers, Regional Sales Superintendent
E. C. Parker, Regional Personnel Manager

Memorandum

To: Bernard H. Parker December 11, 1980
From: C. S. Byers

RE: Robert T. Darden, NC #2414
Agency Service

As you know, the quality of the business in this Agency is below standard as reflected by its loss experience. For this reason, it is important that we take steps to provide service and at the same time, screen-out the negative business. To the extent possible, we desire to steer this business to Agent Darden. The Quality Multi-Line business, and that portion of the Voluntary Personal Auto that is good, should be parceled out to the existing Agents. This can best be accomplished through a cooperative effort by the Sales and Underwriting Departments.

Larry Hall and I have agreed to a procedure whereby Sales will hire a full-time, temporary secretary to service this business from the Fayetteville District Office. (We have learned that a former, long-time Agency secretary may be available to us to fill this position.) Special arrangements will be made with an Underwriter for this secretary to call in and get an immediate evaluation of those risks requesting service. A determination will be made at that time as to the desirability of the case and its reassignment to an Agent. On those cases that are either undesirable or residual, an attempt will be made to steer the customer to Darden. Simultaneous with this action, the case will be re-underwritten with stripping and ceding actions taken as necessary. The negative business will not be reassigned to an existing Agent. At the same time, a systematic review of Policyholder Listings will be made to identify those quality customers having both Voluntary Auto and Homeowners policies with Nationwide. After screening, these select customers will be given priority attention for Agent assignment.

Fortunately, Agent Darden has acquired a voluntary company and is in the process of transferring the business to them. This action is definitely in our best interest.

Because of the size of this Agency, it is likely that this temporary support will be needed for from three-to-six-months. I am attaching a requisition for your approval for this temporary position. We will be able to time our hiring actions in the Sales Department during this period so that the FTE required by this hire will be within Budget.

I would appreciate your approval so that we can activate this program as quickly as possible.

df
[Attachment excluded]

In the United States District Court
For the Eastern District of North Carolina
Fayetteville Division

File No. 83-96-CIV-3

Robert T. Darden,

Plaintiff,

vs.

Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, and Nationwide Life Insurance Company,

Defendants.

Deposition
of
Robert T. Darden

In Raleigh, North Carolina
February 19, 1987
10:30 a.m.
Reported by: F. M. Harvey

• • • • •

Mr. Darden Direct Page 16

Q And if instead of trying to sell insurance during a given portion of a day—instead of choosing to do that you chose to go down to Cross Creek Savings & Loan, where you had $20,000, for example, and negotiate with the banker about extending the CD or whatever you had in order to get it at a higher rate of interest or take it out or move it or transfer it or do whatever you wanted to, you were free to do that, weren't you?

A I was.

Q You were free to look after insurance business or any other kind of business at all times, weren't you?

A Yes, I was.

• • • • •

Mr. Darden Direct Page 40

• • • • •

Q And you sold them all kinds of business, didn't you?

A All types—life, health, automobile, commercial.

Q Fire?

A Fire, homeowners, mutual funds.

• • • • •

Q What did you do when you left Nationwide? Did you write all those 12 to 15 hundred people a letter? I don't suppose you could call that many people on the

Mr. Darden Direct Page 41

telephone without going crazy, could you?

A I sent a letter notifying that I was no longer with Nationwide and that I was independent and would like to continue to service their business.

Q And you expected to get some of that business, and you did, didn't you?

A Yes, sir.

• • • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 83-96-CIV-3

ROBERT T. DARDEN,

Plaintiff

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and NATIONWIDE LIFE INSURANCE COMPANY,

Defendants

Second Affidavit of
Herbert W. Bowman

I, Herbert W. Bowman, having been duly sworn and cautioned, do hereby state as follows:

1. I am an employee of the Nationwide Mutual Insurance Company.

2. My position is that of Director of Agency Planning and Sales Compensation in the Marketing Services Department. In that position, I am responsible for agent compensation, agency relations, and agent manpower planning.

3. Due to my knowledge of the subject matter, and due to the scope of my duties, I have been asked to

compile a list of some of the potential reasons why a Nationwide agent would elect to remain with the Nationwide Insurance Companies as opposed to leaving Nationwide and writing insurance for companies other than Nationwide. Below is a list of some of the potential reasons:

• • • • •

p. Nationwide has management consulting assistance for the agent if the agent expresses a need for this.

q. Nationwide has recruiting, selection and training services available for the agents if they so desire for adding agency employees.

• • • • •

/s/ Herbert W. Bowman
Herbert W. Bowman

Sworn to and subscribed before me this 21st day of March, 1987.

/s/ Signature illegible
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

NO. 83-96-CIV-3

ROBERT T. DARDEN,

Plaintiff

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and NATIONWIDE LIFE INSURANCE COMPANY,

Defendants

Third Affidavit of
Herbert W. Bowman

I, Herbert W. Bowman, having been duly sworn and cautioned, do hereby state as follows:

1. I am employed by the Nationwide Mutual Insurance Company.

2. My position is that of Director of Agency Planning and Sales Compensation in the Marketing Services Department.

3. In that position, I am responsible for agent compensation and benefits, agency relations, and agent manpower planning.

* * * * *

Another method of communication was the Regional Round Table-Agent Advisory Counsel. This communication system was started in either the late 1950's or early 1960's,

and was in existence up until the early 1980's. The system's roots were at the district level. Once per year, a meeting was called at the district level. Agents in that district had the opportunity to attend if they so desired. The purpose of that meeting was for the agents to have the opportunity to discuss any issues, concerns, or suggestions that they had and that they wished the Companies to be aware of. These issues, concerns and suggestions, varied greatly, ranging from the topics of rates, compensation, benefits, product design, claim handling, underwriting rules, etc. At the district meeting, one district representative would be elected by those who attended the meeting. Issues that were then raised at the district meeting would be taken by the representative to the next level meeting, which was a meeting held at the sales region level. Representatives from numerous districts would present the concerns, issues and suggestions that each of their districts had raised. The group would then vote on several of the more important concerns, issues and suggestions to take to the next level, which was the regional level. At the regional level, several representatives representing the various sales regions would be present, and would present the issues, suggestions, and concerns that each of their sales regions had voted to present. At the Regional meeting, the Vice President Regional Manager was present, along with his or her cabinet members for considering the issues raised. At the regional level there was a regional representative elected for the purpose of representing the region's agents at the Home Office Agent Advisory Council meeting, which was also held once per year. The Agent Advisory Council meeting was held in the Home Office, with one representative and one alternate attending from each region. They then raised the concerns, issues and suggestions that had been voted on by the agents at the regional level. The meeting was usually chaired by a Vice-President in Marketing, and was attended by the several Line Operations Vice-Presidents. In addition, the Chairman

of the meeting would usually invite the Home Office personnel from the department to which the concern, issue, or suggestion was applicable. At each level of the system, the concerns, issues, and suggestions were considered, and if they could be answered or adopted at that level, they were. If not, the issue would proceed to the next level. At each level there was also a report-back system set in place, so that the agents would either have a response to their concerns or issues, would know that their suggestion had been considered, even sometimes adopted by the Companies. This entire system was a very valuable tool in communicating with the agents, and vice versa.

One example of the potential input that the Agents had via this system is as follows:

— From 1951-1969, Nationwide maintained an "Agents Retirement Plan." This plan was a nonqualified deferred compensation plan to which both the agent and Nationwide contributed a percentage of the agent's annual earnings not in excess of $10,000 towards an annuity payable at retirement. The maximum annual contributions was $600. Nationwide also maintained an "Extended Earnings Plan" that paid an agent a specified percentage of his last 12 months' renewal commissions if Nationwide cancelled his contract (but *not* if the agent resigned or retired).

— In 1966 and early 1967, Nationwide became aware that the Agents Retirement Plan was no longer serving its intended purpose. In particular, agents were concerned that (a) the level of benefits was inadequate, (b) the ceiling on contributions was outdated, (c) the vesting schedule was too slow, and (d) the compulsory agent contributions might to invested to better effect in other ways, specifically including Keogh plans (authorized by Congress in 1962). Regarding the "Extended Earnings Plan", the agents were concerned because the Plan paid those agents whose contracts were cancelled by Nationwide, and not those who

the agents thought should be getting paid, those who retired, died or became disabled.

— In May 1967, Nationwide management approached the Agents Advisory Council with respect to agent interest in restructuring this program. The Council supported a redesign of the program with an emphasis primarily on retirement and secondarily on death or termination.

— In February 1968, a special meeting of the Advisory Council was convened to present a tentative redesign of the program. This meeting was held *prior* to approval of the new plan by senior management or the Board of Directors, so that agent input could be incorporated into the final proposal. The tentative design proposed was essentially what became the Agents Security Compensation Plan ("Plan"), including the 5-year eligibility requirement and the Extended Earnings and DCIC components. (DCIC was referred to as "Retirement Income Credits" or "RIC" until 1976. For simplicity, however, the "DCIC" terminology is used throughout.) This initial draft of the Plan also proposed forfeiture of benefits in the event of (a) termination as an agent for failure to pay over moneys due Nationwide, for inducing policyholder lapse or replacement, for violation of the law or for employment by Nationwide, (b) competition inside a 25-mile radius within a year of termination, (c) inducing policyholder lapse or replacement after termination or (d) any competition by NADP agents within five years. After extended discussion, the consensus of the Council was that the proposal was a significant improvement that merited further development. However, the Council urged Nationwide to consider (i) accruing DCIC benefits on earnings under $10,000, (ii) including all types of commissions in the DCIC computation (rather than only renewal commissions, as proposed), (iii) adding a vesting schedule that would permit payment of partial benefits upon early retirement (not provided for in the initial draft) and (iv) elimination of the forfeiture provision for certain terminations (provision (a) above). It appears from avail-

able records that no objection was raised with respect to forfeiture provisions (b) and (c) above.

— Management revised the draft Plan in light of the views of the Advisory Council (among others). This revised draft included three of the four principal changes urged by the Council: a vesting schedule for early retirement (age 50 with 10 years of service), an expanded commission base for DCIC, and elimination of the forfeiture provision (provision (a) above) that concerned the Council. DCIC credits on earnings under $10,000 was not included because it would be counterproductive to the Plan's objective of encouraging agency growth. In May 1968, the revised draft Plan was presented to and discussed with the Advisory Council at its regular meeting.

— The Plan was approved by senior management and implemented effective July 1, 1969. The new Plan was communicated to agents generally through meetings that included a film and other materials.

* * * * *

/s/ Herbert W. Bowman
Herbert W. Bowman

Sworn to and subscribed before me this 21st day of March, 1987.

/s/ Signature illegible
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

ROBERT T. DARDEN,
PLAINTIFF,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE MUTUAL LIFE INSURANCE COMPANY,
DEFENDANTS.

PLAINTIFF AND DEFENDANTS' STIPULATIONS AS TO FINDINGS OF FACT

(Filed: April 5, 1989)

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1. Robert T. Darden ("Darden") brought suit on November 8, 1983 pursuant to Section 1132(a)(1)(B) of the Employee Retirement Income Security Act ("ERISA", 29 U.S.C. § 1001, *et seq.*), alleging that Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, and Nationwide Life Insurance Company ("Nationwide") violated the nonforfeitability requirement of ERISA (29 U.S.C. § 1053(a)), by declining to pay sums allegedly due him under the provisions of Nationwide's "Agent's Security Compensation Plan."

2. From September 9, 1960 until November 20, 1980, Darden was an insurance agent for Nationwide.

3. During this period, Darden and Nationwide entered into a series of eight written agent's agreements, the most recent of which became effective January 1, 1977 ("Agent's

Agreement"). The Agent's Agreement provided that Darden was to exclusively represent Nationwide.

4. Each of the contracts entered into between Darden and Nationwide since 1969 has provided for Darden's participation in the Agent's Security Compensation Plan ("ASCP").

5. The ASCP consists of two parts: the Deferred Compensation Incentive Credits ("DCIC") and the Extended Earnings.

6. Participation in the ASCP is limited to those agents with at least five years of service with Nationwide.

7. Under DCIC, Nationwide annually credits an agent a specified percentage of his original and renewal service fees earned each year after he becomes eligible for the ASCP.

8. With respect to Extended Earnings, Nationwide pays an agent an amount equal to his renewal service fees during the last full twelve (12) months preceding cancellation of his agency agreement.

9. Darden was solely responsible for all business expenses including office expenses, salaries of his employees, utilities, overhead items, automobile expenses and the costs of his insurance license. Furthermore, Darden was not entitled to receive from Nationwide any sick leave, annual leave, vacation pay, jury duty pay or any other fringe benefits to which Nationwide's employees were entitled.

10. Darden was compensated through commissions, rather than through a salary. He paid his business expenses out of his commissions, including office maintenance and utilities and salaries of clerical staff. Darden owned the building housing his agency's offices and the furniture used therein, as well as an automobile maintained for business purposes. Darden received his commissions without deduction by Nationwide for income taxes or other charges.

11. Nationwide did not furnish to Darden, nor pay the premiums for any life insurance, health insurance or disability insurance on Darden or any member of his family or any of his employees.

12. Nationwide maintained a qualified retirement plan for its employees during the entire time that Darden represented Nationwide. Darden was not entitled to participate in that plan.

13. Darden had complete discretion to hire and fire his own employees without any input from Nationwide, but he could not hire associate insurance agents without Nationwide's approval.

14. Darden purchased eight life insurance contracts with a total cash surrender value as of 1980 of $22,300. In addition, he acquired a retirement annuity which will mature in the year 2004 with a cash surrender value as of 1980 of $9,400. As of 1980, Darden held shares in mutual funds totalling $33,267. In addition to these funds, Darden also had deposits at several banks of approximately $27,000. Between 1976 and 1980, Darden made deductible contributions to an individual retirement account totally [sic] $7,490.

15. As of November 1980, Darden's personal net worth, disregarding the ASCP, the value of his agency and other assets owned separately by his wife, was approximately $450,000.

16. As a Nationwide agent, Darden was free to solicit the customers he desired and he was also free to select the types of Nationwide insurance he sold and the customers he solicited.

17. Although Darden sold several product lines (including life, homeowner and commercial insurance), his predominant market was automobile insurance, which constituted about 45-50 percent of his business. For the years 1977 through 1980, 58%, 49%, 51% and 49%, re-

spectively of all auto insurance commissions was "ceded" to the North Carolina Reinsurance Facility. If a driver posed such a risk that he failed to meet Nationwide's standards, his policy would be "ceded" to the Reinsurance Facility.

18. By virtue of the location and marketing practices he chose to utilize in the 1970s, Darden attracted an unusual amount of ceded business.

19. Under Paragraph 9 of the Agent's Agreement, the agent or Nationwide had the right to cancel the Agreement at any time after written notice.

20. Section 11(f) of the Agent's Agreement provides, *inter alia*, that the liability of Nationwide to make payments under the ASCP terminates if the agent is licensed with another insurance company within one year following cancellation within a twenty-five mile radius of his prior business location; or if the agency induces policyholders to cancel or replace their Nationwide policies.

21. On December 5, 1980, only fifteen (15) days after his cancellation, Darden reopened his agency as a representative of Bankers and Shippers Company, an insurance agency operating in North Carolina.

22. Darden entered into agency agreements with Quincy Mutual Insurance Company in January 1981 and with Indiana Lumbermen's in February, 1981.

23. Darden represented these and other companies within one year of termination of his Nationwide contract in violation of Section 11(f) of his Agent's Agreement.

24. Darden continued to conduct business out of the same office which he operated while a Nationwide agent.

25. Upon cancellation, Darden mailed letters to each of the between 1200 to 1500 Nationwide customers he then represented, advising them that he represented other companies and would like to continue to service them.

26. Effective November 20, 1980, Nationwide cancelled Darden's contract.

27. Due to Darden's violation of § 11(f) of the Agent's Agreement, Nationwide terminated his benefits under the Plan. Darden filed suit against Nationwide on November 7, 1983 claiming that Nationwide's action violated ERISA's nonforfeiture provisions.

28. Among Darden's assets in November, 1980, were the following:

Asset	Estimated Value
Residence	$120,000
Rental townhouses	125,000
Rental duplex	42,000
Office building	95,000
Subject to mortgage	(33,000)
Cash value of life insurance contracts	22,300
Case [sic] value of annuity	9,400
IRA	8,400
Mutual funds	32,600
Bank deposits	27,000
Net worth	$448,700

29. The Agent's Security Compensation Plan became effective on July 1, 1969. Darden purchased the land for the townhouses and constructed the townhouses on the land prior to the effective date of the Agent's Security Compensation Plan.

30. Of all ASCP participants terminating in 1972-1980, a full 54 percent elected to receive ASCP payments in a three-year payout (the most rapid form of distribution permitted), and about another 24 percent elected four-to ten-year payouts. Only approximately 22 percent elected payout forms that assured the agency of income for life (*i.e.*, an annuity form).

31. During his service for Nationwide, Darden was eligible to maintain an H.R. 10 (Keogh) plan under the federal income tax laws.

This the 28th day of March, 1989.

/s/ Marion G. Follin, III
Marion G. Follin, III
Counsel for Plaintiff

/s/ George R. Ragsdale by Craig G. Dalton, Jr.
George R. Ragsdale
Counsel for Defendants

/s/ Craig G. Dalton Jr.
Craig G. Dalton, Jr.
Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 83-96-CIV-3

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NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE MUTUAL LIFE INSURANCE COMPANY,
DEFENDANTS.

EXCERPTS FROM TRANSCRIPTS OF
PROCEEDINGS APRIL 5, 1989 THROUGH
APRIL 6, 1989

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[7] *ROBERT T. DARDEN*, BEING FIRST DULY SWORN, TESTIFIED DURING *DIRECT EXAMINATION:*

BY MR. FOLLIN:

* * * * * *

[30] Q. WHEN YOU SAY CEDED BUSINESS WHAT ARE YOU REFERRING TO; WE ARE TALKING ABOUT AUTOMOBILE INSURANCE?

A. THAT'S THE BUSINESS THAT NATIONWIDE DIDN'T TAKE VOLUNTARY AND DIDN'T WANT TO INSURE THEM SO THEY RE-INSURED THEM THROUGH THE RE-INSURANCE FACILITY OF NORTH CAROLINA.

Q. DOES NORTH CAROLINA HAVE A MANDATORY AUTOMOBILE LIABILITY INSURANCE PROGRAM?

A. YES, THEY DO.

Q. ARE YOU FAMILIAR WITH THE RULES AND REGULATIONS OF THE NORTH CAROLINA INSURANCE DEPARTMENT ABOUT WRITING AUTOMOBILE LIABILITY INSURANCE?

A. I AM TO THE PART THAT STATES THAT ONCE WE RETAIN ON A LICENSE WE WOULD HAVE TO WRITE ANYONE THAT WALKED IN OUR OFFICE, WE COULD NOT DISCRIMINATE BECAUSE OF BAD DRIVING RECORD, AGE, SEX, OR CREDIT. WE HAD TO HELP IN ANY WAY WE COULD, WE COULDN'T DENY COVERAGE.

Q. WHEN A PERSON CAME INTO YOUR OFFICE FOR AUTOMOBILE LIABILITY INSURANCE, DID THEY FILL OUT AN APPLICATION? [31]

A. YES, THEY DID.

Q. GENERALLY, WHAT INFORMATION WOULD BE ON THE APPLICATION?

A. THE PERSON'S NAME, ADDRESS, PHONE NUMBER IF THEY HAD ONE, THE TYPE OF CAR, AGE OF THE DRIVE [sic], VIOLATIONS OR ACCIDENTS AND THE TYPE OF COVERAGE THEY WERE GETTING.

Q. AFTER THE APPLICATION WAS FILLED OUT, WHAT WOULD YOU DO WITH IT.

A. IT WOULD BE LISTED ON A REPORT AND SENT TO NATIONWIDE WITH A CHECK.

Q. AND WOULD NATIONWIDE—WOULD IT BE SENT TO AN UNDERWRITER AT NATIONWIDE?

A. ONCE IT HIT THE REGIONAL OFFICE THE MONEY WENT TO THE ACCOUNTING DEPARTMENT, THE APPLICATION WENT TO AN UNDERWRITING DEPARTMENT WHERE THEY REVIEWED IT AND THEY MADE A DECISION WHETHER IT SHOULD BE CEDED OR KEPT VOLUNTARY.

Q. WHEN YOU SAY VOLUNTARY, YOU MEAN NATIONWIDE WOULD INSURE THE RISK ITSELF?

A. YES.

Q. WHEN YOU SAY CEDED YOU MEAN?

A. IT WAS INSURED THROUGH THE RE-INSURANCE FACILITY AND ALL THE COMPANIES THAT WERE LICENSED IN NORTH CAROLINA TO DO BUSINESS TO WRITE NORTH CAROLINA INSURANCE PARTICIPATED IN THE RE-INSURANCE FACILITY LOSSES AS WELL AS THEY DID THE PREMIUMS THEY INITIALLY PUT IN IT, ACCORDING TO THE [32] WORK PERCENT THEY HAD IN, AS I UNDERSTAND.

Q. WAS YOUR OFFICE LOCATED VERY CLOSE TO FT. BRAGG AND FAYETTEVILLE?

A. ABOUT A MILE AND-A-HALF.

Q. NOW, DID YOU HAVE A LOT OF APPLICANTS AND CUSTOMERS WHO WERE MILITARY PERSONNEL?

A. YES.

Q. WERE THOSE MILITARY PERSONNEL GENERAL [sic] CEDED OR VOLUNTARY, IF YOU KNOW?

A. ALL WERE CEDED, JUST ABOUT.

Q. WHY WERE THEY ALL CEDED?

A. BECAUSE THEY WERE MILITARY AND NATIONWIDE DIDN'T WANT MILITARY CEDED SINGLE GUYS.

THE COURT: CEDED POLICIES YOU ONLY GET THE STATUTORY LIMITS ON THAT; YOU CAN ONLY GET THE STATUTORY LIMITS ON CEDED BUSINESS?

WITNESS: ON CEDED BUSINESS, THAT'S CORRECT.

BY MR. FOLLIN:

Q. WAS YOUR OFFICE WRITING A GOOD DEAL OF CEDED BUSINESS AT ITS LOCATION?

A. BECAUSE OF LOCATION AND THE MILITARY PERSONNEL ON BASE.

Q. ALL RIGHT. DID NATIONWIDE DO ANYTHING TO DISCOURAGE YOU FROM SERVING MILITARY PERSONNEL?

A. ON SEVERAL OCCASIONS THEY DID, YES. I WAS TOLD BY MR. MAYO AND MR. KIKER THAT I SHOULD MOVE MY OFFICE TO THE [33] FIRST-CITIZENS BANK

BUILDING DOWNTOWN TO THE TENTH FLOOR AND I WAS ALSO TOLD BY MR. MAYO AND BILLY KIKER THAT I SHOULD CLOSE MY OFFICE FROM ELEVEN TO TWELVE-THIRTY DURING THE TIME THE MILITARY HAD OFF TO DISCOURAGE FROM WRITING ANY MILITARY. I WAS GIVEN A LIST OF QUESTIONS THAT WE SHOULD ASK OUR POLICYHOLDERS THAT WAS GIVEN TO ME BY MR. MAYO AND MR. KIKER FOR THE SECRETARIES TO ASK WHEN THEY WERE INTERVIEWING CUSTOMERS FOR INSURANCE.

Q. WHAT WAS THE POINT OF ASKING THE QUESTIONS; WAS IT TO FIND OUT THEIR DRIVING RECORD OR WHAT?

A. FIND OUT IF THEY HAD ANY ACCIDENTS OR VIOLATIONS AND WHERE THEY LIVED AND INSTRUCTED ME AS TO THE WAY WE SHOULD ASK THE QUESTIONS. MR. MAYO INFORMED ME THAT WE SHOULDN'T ASK HAVE YOU HAD ANY IN THE LAST THREE YEARS, THAT WE SHOULD ASK HOW MANY HAVE YOU HAD IN THE LAST THREE YEARS. THAT WOULD GET AN EASY YES OR NO.

Q. THAT WOULD GET AWAY FROM AN EASY YES OR NO?

A. YES.

Q. IN THE LETTER, THE SECOND PARAGRAPH REFERS—

THE COURT: LET ME SEE IF I UNDERSTAND THIS NOW.

IT WAS IN YOUR INTEREST TO CONTRACT, AS THE AGENT, NEW INSURERS, WASN'T IT?

WITNESS: YES, SIR.

THE COURT: BECAUSE THAT'S THE WAY NEW BUSINESS WAS WRITTEN? [34]

WITNESS: THAT'S CORRECT.

THE COURT: BUT IT WAS IN NATIONWIDE'S INTEREST TO ONLY CONTRACT VOLUNTARY BUSINESS OR

MAXIMIZE THE AMOUNT OF VOLUNTARY BUSINESS THEY CONTRACTED; IS THAT CORRECT?

WITNESS: THAT'S CORRECT.

THE COURT: ALL RIGHT. THANK YOU.

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[43] Q. LET ME ASK YOU—LET ME GO BACK. MR. DARDEN, WERE YOU AT ONE POINT TERMINATED AS AN AGENT FOR NATIONWIDE?

A. YES, I WAS.

Q. DO YOU RECALL ABOUT WHEN THAT OCCURRED?

A. NOVEMBER 1980.

Q. LET ME SHOW YOU A DOCUMENT MARKED EXHIBIT 33 AND ASK YOU WHETHER YOU CAN IDENTIFY THAT?

A. YES, I CAN. EXHIBIT 33 DATED OCTOBER 29, 1980, IS A LETTER TO ME FROM MR. BILL—WILLIAM MAYO, WHO WAS THE REGIONAL SALES MANAGER, AND INFORMED ME THEY WERE CANCELLING MY CONTRACT EFFECTIVE ON NOVEMBER 13, 1980.

Q. AND HOW MUCH NOTICE DID YOU RECEIVE OF THE CANCELLATION? DESCRIBE HOW IT OCCURRED, MR. DARDEN.

A. I WAS CALLED TO GO TO RALEIGH BY BILLY KIKER, THE DISTRICT SALES MANAGER, AND THAT MR. MAYO WANTED TO SEE ME AND I ASKED HIM AT THE TIME WHAT ABOUT AND HE SAID PROBABLY YOUR LOSS RATIO. WE AGREED TO MEET IN RALEIGH AT MR. MAYO'S OFFICE AND WHICH WE DID MEET UP THERE DURING THE COURSE OF THE CONVERSATION WHEN I WAS THERE THEY INDICATED TO ME YOUR CONTRACT HAD BEEN CANCELLED.

* * * * * *

[44] Q. GO AHEAD.

A. SO I IMMEDIATELY LEFT AND TOLD THEM TO PLEASE SEND ME SOMETHING IN WRITING WHICH THIS IS THE LETTER THAT I RECEIVED, YES.

Q. OKAY. AND NOW, THIS LETTER IN THE SECOND PARAGRAPH SAYS IF YOU HAVE NOT ALREADY DONE SO PLEASE RETURN ALL NATIONWIDE MANUALS, PORTFOLIOS, REFERENCE GUIDES, POLICIES AND OTHER SUPPLIES, POLICIES ON FILE OF DISTRICT SALES MANAGER AS SOON AS POSSIBLE?

A. I COMPLIED WITH THAT REQUEST AND GAVE ALL THE APPLICATIONS, POLICIES AND EVERYTHING I HAD ON THE POLICYHOLDERS OF MINE TO BILLY KIKER AND THE MANUALS AND EVERYTHING THEY FURNISHED ME THEY GOT BACK.

Q. YOU GAVE THEM EACH POLICYHOLDER FILE?

A. BEG YOUR PARDON?

Q. YOU GAVE THEM EVERY POLICYHOLDER FILE?

A. EVERY POLICYHOLDER FILE THEY GOT. IF I HAD IT THEY GOT IT.

Q. DID YOU KEEP A LIST OF CUSTOMERS?

A. I HAD A LIST OF CUSTOMERS, THAT'S RIGHT.

Q. HOW MANY FILES, APPROXIMATELY, DID YOU HAVE?

A. APPROXIMATELY TWELVE, FIFTEEN HUNDRED. [45]

Q. AND HOW DID—DID MR. KIKER COME TO YOUR OFFICE AND PHYSICALLY PICK THEM UP?

A. YES, HE DID, IN HIS CAR.

Q. NOW, AS A NATIONWIDE AGENT, DID YOU AGREE IN YOUR AGREEMENT YOU WOULD DELIVER THE POLICIES AND FILES TO THEM IF YOU WERE TERMINATED?

A. YES.

Q. NOW, AND IN THAT CASE—IF YOU WERE TERMINATED WAS THERE ANY WAY THAT YOU COULD—STRIKE THAT. EXPLAIN HOW AUTOMOBILE POLICIES AND HOMEOWNER POLICIES WERE RENEWED BY NATIONWIDE WHEN YOU WERE AN AGENT? WHAT WAS THE MECHANICS OF IT?

A. ONCE I ISSUED THE POLICY OR THE HOME OFFICE OF DISTRICT RALEIGH OFFICE ISSUED A POLICY, AT THE EXPIRATION DATE THEY WOULD SEND OUT A RENEWAL TO RENEW THE POLICY ON HOMEOWNERS OR AUTOMOBILE, WHATEVER TYPE OF INSURANCE IT MIGHT HAVE BEEN AND I WAS TO RECEIVE A COPY OF THE RENEWAL NOTICE AND THEY WOULD PAY THE PREMIUM TO ME OR DIRECTLY TO THE COMPANY.

Q. SO THE RENEWAL NOTICE WOULD BE SENT OUT BY NATIONWIDE; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND THE BILL—NORMALLY THE CHECK WOULD BE—THE POLICY WOULD BE SENT STRAIGHT BACK TO NATIONWIDE?

A. MOST OF THE TIME BUT SEVERAL PEOPLE COME BY THE OFFICE AND PAY IF IT'S CONVENIENT SO I WOULD COLLECT IT AND SEND [46] IT TO NATIONWIDE.

Q. ARE YOU FAMILIAR WITH THE TERM EXPIRATIONS?

A. YES.

Q. WHAT DOES IT MEAN TO YOU?

A. DEALING WITH NATIONWIDE, THE EXPIRATION IS THE POLICIES THAT ARE ON MY OFFICE OR IN MY OFFICE THAT I HAVE WRITTEN AND THAT HAVE AN EXPIRATION DATE AND THEY ARE CONTROLLED AND OWNED BY NATIONWIDE.

Q. NOW, AS NATIONWIDE'S AGENT—COULD YOU SELL YOUR EXPIRATIONS TO ANOTHER AGENT TO TAKE OVER YOUR OFFICE?

A. NO.

Q. NOW, YOU'RE WHAT'S CALLED AN INDEPENDENT AGENT; IS THAT CORRECT?

A. YES, I AM AN INDEPENDENT AGENT.

Q. NOW, DO YOU HAVE EXPIRATIONS AS AN INDEPENDENT AGENT?

A. I DO.

Q. AND COULD YOU SELL THOSE EXPIRATIONS IF YOU WANTED TO TO SOMEONE TO TAKE OVER YOUR OFFICE?

A. YES, I COULD.

Q. IS THERE SOME PRICE OR VALUE TO THOSE EXPIRATIONS?

A. I THINK THE AVERAGE PRICE IS NOW ROUGHLY TWO AND-A-HALF TIMES THE RENEWAL COMMISSION OF THE PREVIOUS YEAR.

Q. NOW, AS AN INDEPENDENT AGENT, IS THAT SOMETHING THAT YOU RECENTLY PLANNED TO DO WHEN YOU RETIRED AND SOLD YOUR AGENCY? [47]

A. EVENTUALLY I WILL UNLESS I DECIDE TO GIVE IT TO SOMEBODY.

Q. WOULD YOU USE THE MONEY YOU GOT ON THE SALE TO HELP YOU RETIRE?

A. I WOULD.

THE COURT: COULD YOU HAVE SOLD YOUR NATIONWIDE AGENCY IF YOU WERE A NATIONWIDE AGENT?

WITNESS: NO SIR, BECAUSE THEY OWN ALL OF YOUR EXPIRATIONS.

BY MR. FOLLIN:

Q. AFTER YOU WERE TERMINATED AS A NATIONWIDE AGENT, WHAT DID YOU DO? DID YOU SET UP YOUR OWN OFFICE?

A. I SET UP MY OWN INDEPENDENT OFFICE, MADE CONTACT WITH SEVERAL COMPANIES AND RECEIVED LICENSEES WITH THOSE AND STARTED WRITING INSURANCE, OR KEPT WRITING INSURANCE.

Q. DID YOU WRITE OUT OF THE SAME OFFICE?

A. SAME LOCATION.

Q. DID YOU SEND A LETTER TO THE CUSTOMER LIST; YOU HAD SOME KIND OF LETTER TO THEM TELLING THEM THIS?

A. YES, I SENT OUT A LETTER TO ALL THE ONES I HAD THE ADDRESSES FOR AND EXPLAINED THAT I WAS NO LONGER A NATIONWIDE AGENT AND THAT I WAS AN INDEPENDENT AGENT AND STILL IN THE INSURANCE BUSINESS AND IF I COULD BE OF SERVICE TO THEM THEY COULD CALL ME.

Q. NOW, OUT OF THOSE TWELVE TO FIFTEEN HUNDRED POLICIES [48] YOU HAD AS A NATIONWIDE AGENCY, APPROXIMATELY HOW MANY RENEWED THEIR POLICIES WITH YOU WHEN YOU BECAME AN INDEPENDENT AGENT; DO YOU HAVE AN ESTIMATE?

A. PROBABLY A HUNDRED OR TWO HUNDRED. OF COURSE, MOST OF THEM ARE YOUR FRIENDS AND THE PEOPLE THAT I KNEW AND PLAYED GOLF WITH OR WENT TO CHURCH WITH OR RELATIVES, WHATEVER. THEY WENT WITH ME ANYWAY REGARDLESS OF WHAT COMPANY I WAS WITH AND THEY WERE DEDICATED PEOPLE.

Q. YOU KNOW WHAT NATIONWIDE DID WITH THE REST OF THEM, WITH THE BALANCE OF THE TWELVE OR FIFTEEN HUNDRED POLICIES?

A. AFTER A PERIOD OF MONTHS THEY WERE DISTRIBUTED AMONG THE AGENTS IN DISTRICT NINETEEN. THEY WERE GIVEN ALL THE BUSINESS I HAD. THEY WERE DISTRIBUTED AMONG FOUR OR FIVE AGENTS, I BELIEVE. THEY MAY HAVE EVEN HIRED ONE AGENT TO TAKE SOME OF IT. I'M NOT SURE.

* * * * * *

[DARDEN-CROSS] [75]

Q. YOU EXERCISED YOUR FUNDAMENTAL RIGHT UNDER YOUR AGENT'S AGREEMENT AND REFUSED TO FOLLOW HIS SUGGESTION?

A. ON THAT ONE INSTANCE.

Q. YOU PUT YOUR FOOT DOWN AND SAID I DON'T HAVE TO DO THAT AND I'M NOT GOING TO DO THAT?

A. I TOLD HIM I DIDN'T WANT TO CLOSE MY OFFICE.

Q. AND YOU NEVER DID IT, DID YOU?

A. NO.

* * * * * *

[160] *GEORGE W. FRANK* [SIC], BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWED DURING *DIRECT EXAMINATION*:

BY MR. RAGSDALE:
[FRINK-CROSS] [193]

Q. WERE YOU PRESENT AT ALL THE MEETINGS OR ANY OF THE MEETINGS THAT TOOK PLACE WITH THE AGENTS' ADVISORY COUNCIL IN '67 AND '68?

A. YES.

Q. AND HAVE YOU ATTENDED SUBSEQUENT AGENTS' MEETINGS?

A. I ATTENDED ALL OF THEM EXCEPT FOR A FIVE-YEAR PERIOD, '75, LATE '75 THROUGH 1980.

Q. LET ME SHOW YOU WHAT'S PREVIOUSLY BEEN MARKED AS AN EXHIBIT, EXHIBIT NO. 28, IT'S 1978 AGENTS' ADVISORY COUNCIL MINUTES?

A. THAT'S ONE OF THOSE. I WAS NOT THERE.

Q. IF YOU WILL TURN TO THE THIRD PAGE, THERE'S A LIST OF PEOPLE WHO WERE THERE. DO YOU SEE THAT?

A. YES.

Q. DO YOU SEE MR. JOHNNY FISHER PRESENT, GENERAL MANAGER?

A. YES.

Q. WAS HE THE CHIEF EXECUTIVE OFFICER AT THAT TIME OF THIS COMPANY?

A. HE WAS CHIEF OPERATING OFFICER.

Q. BUT HE WOULD BE THE SENIOR PERSON THAT WAS PRESENT AT THIS MEETING; WAS HE NOT?

A. YES.

Q. AND IN A MEETING LIKE THIS, DO THEY VOTE AND EVERYBODY ACCEPT THE MAJORITY VOTE OR DOES SOMEBODY LIKE MR. FISHER [194] MAKE THE DECISION?

A. I NEED TO UNDERSTAND THE QUESTION.

Q. THIS AGENTS' ADVISORY COUNCIL MEETS AND AFTER THE MEETING IS OVER WHO DECIDES WHAT'S DONE?

A. I WOULD SAY MR. FISHER.

Q. MR. FISHER DOES, RIGHT?

A. OR COULD BE THE BOARD, DEPENDING ON THE ISSUE INVOLVED.

Q. THE BOARD OF DIRECTORS?

A. RIGHT.

THE COURT: WAS THE ISSUE OF FORFEITABILITY OF THESE BENEFITS, TO YOUR KNOWLEDGE, EVER DISCUSSED AT ANY OF THESE ADVISORY MEETINGS?

WITNESS: NOT SINCE IT WAS PUT IN PLACE.

BY MR. FOLLIN:

Q. LET ME ASK YOU A QUESTION. NOW, ARE THE PEOPLE LISTED THERE, THERE'S A WARREN H. RADNOR, VICE-PRESIDENT MARKETING SERVICES?

A. YES, RIGHT.

Q. WAS HE YOUR PREDECESSOR IN YOUR JOB?

A. HE WAS ONE. THERE WAS ONE BETWEEN US.

Q. SO AT ONE TIME MR. RADNOR HELD THE JOB YOU HELD, JUST UNTIL RECENTLY?

A. YES.

Q. HE WOULD BE THE PERSON RESPONSIBLE AND WOULD KNOW WHAT'S GOING ON WITH THIS AGENTS' SECURITY COMPENSATION [195] PLAN; WOULD HE NOT?

A. AT THIS POINT, YES.

Q. NOW, IF YOU WILL TURN TO PAGE NINE OF THESE MINUTES. DO YOU SEE THE AGENT COMPENSATION AND UNDER THE AGENTS' SECURITY COMPENSATION PLAN IT SAYS ISSUES FROM FIVE REGIONS WHERE AGENTS WERE DIRECTLY CONCERNED WITH CHANGING THE FORMULA TO EXTEND THE FIRST RECOMMENDATION INCLUDES AN INCREASE AT RETIREMENT TO AN AMOUNT EQUAL TO TWENTY-FOUR MONTHS RENEWALS AND PAYMENT PERIODS OF FIVE YEARS. WAS THAT RECOMMENDATION EVER ADOPTED?

A. NO.

Q. SECOND RECOMMENDATION WAS INCREASE EXTENDED EARNINGS TO BOTH RETIREMENT AND DISABILITY TWO TIMES THE PREVIOUS YEAR RENEWALS AND CHANGE FORMULA TO INCLUDE NEW AND RENEWAL COMMISSIONS; IS THAT THE RECOMMENDATION ADOPTED?

A. NO.

Q. THIRD RECOMMENDATION INCREASE EXTENDED EARNINGS TWO TIMES RENEWALS BASING RENEWALS ON THE LAST FIVE YEARS OF SERVICE, THROWING OUT THE BEST AND AVERAGING THE OTHER THREE; WAS THAT ADOPTED?

A. NO.

Q. THE FOURTH RECOMMENDATION IS TO INCREASE EXTENDED EARNINGS BEYOND ONE YEAR, BASED UPON DOLLARS SAVED, PAYING FIFTY PERCENT RENEWAL RATE FOR FOUR YEARS INSTEAD OF TWO YEARS; WAS THAT ADOPTED? [196]

A. NO.

Q. THE LAST RECOMMENDATION WAS INCREASE EXTENDED EARNINGS BY INCLUDING BOTH NEW AND RENEWAL COMMISSIONS FOR PRECEDING TWELVE MONTHS AND PAY TWO YEARS INSTEAD OF ONE; WAS THAT ADOPTED?

A. NO.

Q. THEN THE NEXT PARAGRAPH SAYS IN CONJUNCTION WITH THESE RECOMMENDATIONS THERE WAS CONCERN EXPRESSED REGARDING VESTING OF DEFERRED COMPENSATION; DO YOU SEE THAT?

A. YES.

Q. ONE GENTLEMAN FELT THAT ANY DEFERRED COMPENSATION INCENTIVE CREDITS SHOULD BE FULLY AND PERMANENTLY VESTED. GOES ON TO SAY NO LOSSES POSSIBLE THROUGH EITHER QUALIFIED OR NON-QUALIFIED CANCELLATION OF THE AGENTS' AGREEMENT, CORRECT?

A. THAT'S WHAT I SAID.

Q. AND MR. WAGNER RESPONDED, DIDN'T HE, YOU WANT TO READ HIS RESPONSE INTO THE RECORD PLEASE?

A. MR. WAGNER RESPONDED REGARDING THE VESTING OF DCIC, HE EXPLAINED THE AGENTS' COMPENSATION PLAN IS A NON-QUALIFIED PLAN AS FAR AS THE IRS IS CONCERNED, SINCE THERE'S NO EMPLOYEE/EMPLOYER RELATIONSHIP. FUNDS ARE SET ASIDE FOR THE PAYMENT OF BOTH DCIC AND EXTENDED EARNINGS. THE DCIC BENEFITS EARNED BY THE AGENTS ARE FUNDED ANNUALLY BY DEPOSITING IT, PRESENT DOLLAR VALUE OF THE FUTURE [197]BENEFIT GROUP ANNUITY CONTRACT IN A LIFE—THESE FUNDS—ASSETS WOULD BE SUBJECT TO THE CLAIMS OF ALL CREDITORS IN THE EVENT OF SEVERE FINANCIAL CRISIS IN THE COMPANY. SUCH FUNDS CANNOT BE FULLY PROTECTED FROM CREDITORS UN-

DER A NON-QUALIFIED PLAN. THEY ARE FULLY PROTECTED AS—THEY ARE AS FULLY PROTECTED AS THEY CAN BE.

Q. YOU WANT TO READ THE NEXT PARAGRAPH?

A. THE COMPANIES HAVE NO INTENTION OF MAKING AGENTS' SECURITY PAYMENTS AND THEN PERMITTING THE AGENTS TO COMPETE WITH THE COMPANIES FOR THE BUSINESS IN THE PORTFOLIO. THE INDEPENDENT CONTRACTOR OR AGENT CAN CHOOSE TO COMPETE FOR THE BUSINESS AND FOREGO THE BENEFIT PAYMENTS OR ACCEPT THE BENEFITS AND NOT COMPETE.

Q. THAT'S A PROVISION IN THIS AGREEMENT SINCE 1969?

A. RIGHT.

Q. IT'S NEVER BEEN CHANGED, HAS IT?

A. NO.

Q. AND EVERY AGENT SINCE SIGNED THESE SAME AGREEMENTS?

A. RIGHT.

Q. NO DIFFERENCE IN ANY AGENT'S AGREEMENT EXCEPT A GEOGRAPHICAL STATE LAW AGREEMENT?

A. THAT'S RIGHT.

Q. SO THEY NEVER CHANGED THE PROVISION THAT AN AGENT FORFEITS HIS EXTENDED EARNINGS AND HIS DEFERRED COMPENSATION IF HE COMPETES WITH THE COMPANY AS SET OUT IN THE AGREEMENT? [198]

A. THAT'S CORRECT.

Q. AND THIS REPRESENTS A REQUEST THAT IT BE CHANGED; DOES IT NOT?

A. IT DOES.

Q. SO NOW YOU KNOW A REQUEST WAS MADE AND IT WAS DENIED,WASN'T IT?

A. RIGHT.

Q. YOU SAID MR. WAGNER SAID THEY HAD NO INTENTION OF MAKING THAT CHANGE?

A. THAT'S RIGHT.

Q. AND THAT'S YOUR UNDERSTANDING OF WHAT THE POSITION OF NATIONWIDE IS; IS IT NOT?

A. YES.

Q. NOW, IF YOU WILL GO TO THE NEXT PARAGRAPH. IT SAYS, ANOTHER DELEGATE STATED THE AGENTS IN HIS REGION FELT A RETIRING AGENT SHOULD HAVE THE RIGHT TO NEGOTIATE A SEPARATE AGREEMENT BETWEEN THE RETIRING AGENT AND ANOTHER NATIONWIDE PURCHASING AGENT WOULD BE THE ONE WHO'S QUALIFIED AND IT'S UP TO THE ADDITIONAL EXPERIENCE COULD BE HELD AT A MAXIMUM ONE AND-A-HALF TIMES THE EXTENDED EARNINGS. NOW, MR. WAGNER RESPONDED TO THAT SUGGESTION. READ HIS RESPONSE INTO THE RECORD, WHICH IS THE NEXT PARAGRAPH.

A. MR. WAGNER RESPONDED THAT EXTENDED EARNINGS IS ONLY ONE PART OF THE AGENTS' SECURITY COMPENSATION PLAN. THE [199] PLAN WAS DESIGNED IN PART TO PROVIDE RETIREMENT DOLLARS FOR THE AGENTS. HE POINTED OUT THAT IT WAS NOT FAIR TO COMPARE THE NATIONWIDE AGENTS' COMPENSATION PLAN WITH THE AGENCY PURCHASE WHICH OCCURS IN THE AMERICAN AGENCY SYSTEM. THE EXTENDED EARNINGS ISSUE, AS PRESENTED, IS ONLY ONE PART OF THE AGENTS' SECURITY COMPENSATION PLAN. THE TOTAL PLAN, INCLUDING DCIC, SHOULD BE CONSIDERED IN ANY RE-EVALUATION. AS FAR AS AN AGENT NEGOTIATING WITH SOMEONE ELSE IN ORDER FOR A CONTRACT TO EXIST, THERE MUST BE AGENT OWNERSHIP OF THE BUSINESS. HE SAID THAT AT NATIONWIDE THAT WAS NOT THE CASE AND THERE WAS NO POSSIBILITY OF THAT OCCURRING.

• • • • • •

[202] Q. LET ME SHOW YOU A COPY OF PLAINTIFF'S EXHIBIT 38, MR. FRANK [sic] THIS APPEARS TO BE A PROGRAM OUTLINE FOR A MEETING OF NATIONWIDE AGENTS WHICH WAS TO BE HELD SOME TIME IN 1980; IS THAT CORRECT?

A. RIGHT.

Q. AND IT DIRECTS THE PERSON WHO IS PRESIDING—THE POINT OF THE DOCUMENT IS TO DIRECT THE PERSON PRESIDING OVER THE MEETING TO GIVE THEM AN OUTLINE OF WHAT TO DO AT THE MEETING?

A. RIGHT.

Q. IT WAS GENERATED AT THE HOME OFFICE, WAS IT NOT?

A. YES.

Q. AND IF YOU WILL TURN TO PAGE TWO OF THE MEETING OUTLINE.

A. YES.

Q. YOU WILL NOTICE TOWARD THE MIDDLE OF THE PAGE THERE'S A PARAGRAPH THAT SAYS NOTE, AND IN ALL CAPS; DO YOU SEE THAT?

A. RIGHT.

Q. AND IN A SECTION THAT PERTAINS TO HANDING OUT A REVISED AGENTS' AGREEMENT FOR THE AGENTS TO SIGN; IS IT NOT? [203]

A. IT SAYS TWO COPIES. ABOVE THAT, SIGNED AGREEMENTS ARE AVAILABLE FOR EACH AGENT.

Q. RIGHT. SO IS A COPY GIVEN TO THE AGENT AND THE DISTRICT SERVICE MANAGER SIGNED A COPY ALSO; IS THAT CORRECT?

A. CORRECT.

Q. AND THE NOTE SAYS, AS IN THE PAST OUR POSITION WILL BE THAT ANY AGENT REFUSING TO SIGN

THE NEW AGREEMENT WILL HAVE HIS OR HER EXISTING AGREEMENT CANCELLED AS OF JANUARY 1, 1981; IS THAT CORRECT?

A. CORRECT.

• • • • • •

[207] MR. RAGSDALE:

• • • • • •

HAROLD A. TOLAR, BEING FIRST DULY SWORN, TESTIFIED AS [208] FOLLOWS DURING *DIRECT EXAMINATION*: [209]

Q. ARE YOU FREE TO OPERATE YOUR AGENCY IN ANY MANNER IN WHICH YOU CHOOSE?

A. WITHIN THE GUIDES, YES, SIR; WITHIN THE GUIDELINES OF OF [sic] THE STATE OF NORTH CAROLINA.

Q. ALL RIGHT. YOU ARE NOT ALLOWED TO BREAK THE LAW BUT OTHERWISE IT'S YOUR AGENCY TO DO AS YOU WANT?

A. PRETTY MUCH SO, YES, SIR.

• • • • • •

[230] MR. RAGSDALE: I CALL MR. RICHARD STEWART.
RICHARD E. STEWART, BEING DULY SWORN TESTIFIED AS FOLLOWS DURING *DIRECT EXAMINATION*:

• • • • • •

[236] BY MR. RAGSDALE:

Q. WELL, MR. STEWART, CONTINUE ALONG THAT TRAIN OF THOUGHT AND DESCRIBE, IF YOU WOULD, FOR JUDGE BOYLE, IN COLLOQUY QUESTIONING WITH HIM WHAT THE DETAIL AND THE FOCUS AND THE INGREDIENTS OF THE DCIC ASPECT OF THIS PLAN ARE VERSUS THE TRADITIONAL INGREDIENTS AS ELEMENTS OF A PENSION PLAN.

• • • • • •

[237] THEIR THIRD OBJECTIVE, AFTER GROWING AND TRAINING PEOPLE TO BECOME CAREER AGENTS, WAS TO GIVE THE AGENT THE ECONOMIC EQUIVALENT OF

WHAT HE WOULD HAVE IF HE HAD BEEN AN INDEPENDENT AMERICAN AGENT—AMERICAN SYSTEM AGENT, BUT THEY HAD TO DO THAT WITHOUT GIVING UP THE KEY THING THAT DISTINGUISHES A NATIONWIDE/STATE FARM GROUP-TYPE EXCLUSIVE AGENT FROM AN AMERICAN AGENCY SYSTEM AGENT AND THAT IS IN THE NATIONWIDE-TYPE SYSTEM THE AGENT DOES NOT OWN THE EXPIRATIONS; MAYBE THE COMPANY DOES OR WITH NATIONWIDE, NOBODY DOES.

* * * * * *

[3] *DALE W. SPIEGELBURG*, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWED DURING *DIRECT EXAMINATION:*

BY MR. RAGSDALE:

* * * * * *

[4] Q. WERE THE AGENTS PLEASED WITH THAT PLAN?

A. THEY WERE TOTALLY UNHAPPY WITH IT BECAUSE IT COMPENSATED THE LOW-END AGENT, THE AGENT THAT WASN'T PRODUCING. YOU WANT ME TO GO FURTHER?

Q. YES, I WANT YOU TO TELL JUDGE BOYLE—I WANT YOU TO TELL HIM THE STORY. I WILL ASK YOU ONE QUESTION AND YOU TELL THE STORY. TELL JUDGE BOYLE THE STORY OF THE GA 103 [5] PLAN, WHY THE AGENTS DIDN'T LIKE IT AND HOW THE AGENTS' SECURITY COMPENSATION PLAN WAS BORN.

A. THE FORMER RETIREMENT PLAN THAT WAS IN PLACE FOR THE COMPANY AT THAT TIME WAS A PLAN THAT COMPENSATED FOR THE FIRST TEN THOUSAND DOLLARS OF INCOME. AN AGENT COULD PARTICIPATE TWO PERCENT IN THE COMPANY. MAXIMUM PARTICIPATION WAS SIX PERCENT. AS I SAID, IT COMPENSATED ONLY FOR THE FIRST TEN THOUSAND DOLLARS. THE AGENTS IN THE FIELD WERE TOTALLY UNHAPPY THAT NO MATTER HOW HARD THEY WORKED THEY COULDN'T BUILD CREDITS OR SAVINGS FOR THE FUTURE.

IN 1967 IT WAS CONCEIVED BY THE HOME OFFICE AND THE AGENTS' ADVISORY COUNCIL A PLAN TO COMPENSATE THE AGENTS THAT REALLY WANTED TO WORK AND GROW. AND FROM THIS EFFORT, BACK IN 1967 THROUGH 1968 AND '69 WHEN I BECAME A MEMBER OF THE COUNCIL, THIS PLAN WAS BORN. IT WAS BROUGHT BACK TO THE AGENTS' COUNCIL FOR CRITICISM, CORRECTION, FURTHER ADOPTION. IT WAS PURIFIED TO THE POINT THAT WE TOOK IT TO THE FIELD AND INTRODUCED IT TO AGENTS TO GET THEIR REACTION FROM IT. AFTER THAT REACTION WE HAD SPECIAL MEETINGS BACK AT THE HOME OFFICE TO TELL THE OFFICERS OF THE COMPANY REALLY WHAT THE AGENTS IN THE FIELD FELT ABOUT THE PROGRAM.

* * * * * *

[9] Q. DO YOU HAVE ANY PERSONAL OBJECTIONS TO TELLING JUDGE BOYLE THE EXTENT AND NATURE OF THOSE CREDITS?

A. WITHOUT THE YEAR 1988 THERE, BECAUSE I HAVEN'T RECEIVED THE 1988 STATEMENT YET, BUT AT THE END OF 1987 I HAD JUST UNDER SEVEN HUNDRED THOUSAND DOLLARS OF CREDITS.

* * * * * *

(6)

No. 90-1802

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an insurance agent, found by the district court to be an independent contractor at common law, is an "employee" for purposes of the Employee Retirement Income Security Act of 1974.

PARTIES TO THE PROCEEDING

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Petitioners.

Petitioners are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Petitioners, parent companies of the Petitioners, and mutual insurance companies and mutual funds affiliated with the Petitioners:

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Company
Wausau County Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

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OCTOBER TERM, 1991

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Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The initial opinion of the district court (Pet. App. 47a-50a)[1] was not reported. The opinion of the court of appeals (Pet. App. 32a-46a), which vacated and remanded that district court decision, is reported at

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[1] References to the appendix to the petition for certiorari are designated "Pet. App." References to the joint appendix are designated "JA," and references to the appendix to this brief are designated "A."

796 F.2d 701. The opinion of the district court on remand (Pet. App. 13a-31a) is reported at 717 F. Supp. 388. The second opinion of the court of appeals (Pet. App. 1a-12a) is reported at 922 F.2d 203.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1991. (Pet. App. 12a) A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on February 22, 1991. (Pet. App. 51a-52a) The petition for writ of certiorari was filed on May 22, 1991, and was granted on October 15, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3(6) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6) (1988), provides: "The term 'employee' means any individual employed by an employer."

Section 2 of ERISA, 29 U.S.C. § 1001 (1988), the statutory preamble entitled "Findings and Declaration of Policy," is reprinted in the appendix to this brief. (A-1a)

STATEMENT OF THE CASE

A. The Facts

Petitioners Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, and Nationwide Life Insurance Company ("Nationwide") contract for the distribution of insurance with insurance agents. (Pet. App. 33a) Nationwide's relationship with each agent is governed by an Agent's Agreement. (Pet. App. 33a) Since 1969, these Agreements have

provided for certain payments referred to as the Agent Security Compensation Plan ("ASCP"). (Pet. App. 3a)

Nationwide's relationship with Robert T. Darden ("Darden"), which began in 1960, was governed by eight successive Agent's Agreements, each of which specified that his relationship with Nationwide was that of an independent contractor. (JA 7) Darden's Agreements expressly provided that ASCP payments, otherwise payable after termination of his contractual relationship with Nationwide, would not be made if: 1) he engaged in the insurance business, in competition with Nationwide, within one year of the cancellation of the Agreement with Nationwide and within a twenty-five mile radius of his Nationwide business location; 2) he at any time after cancellation of the Agreement induced a Nationwide policyholder to cancel insurance coverage by Nationwide; or 3) he replaced any insurance contract in force with Nationwide or furnished the name of the policyholder to a competitor. (Pet. App. 48a)

Darden operated his insurance agency as an independent business. He selected and owned the building and equipment used in his business, and he maintained the building and equipment at his own expense. (Pet. App. 39a) Darden hired, fired, and compensated his own staff. Darden determined the hours he worked, and he received compensation from Nationwide (other than the ASCP) solely in the form of commissions, which he reported to the Internal Revenue Service as income from self-employment. (Pet. App. 39a-40a, 48a-49a) Darden selected his customers and the types of Nationwide insurance he focused on selling and was wholly responsible for the operation

of his insurance agency and its financial success or failure. (Pet. App. 48a-49a) Nationwide offered seminars for Darden and his employees concerning his insurance practices, as well as suggestions about making his insurance business more profitable; he was not, however, required to attend those seminars or to adopt Nationwide's suggestions. (Pet. App. 49a)

Darden placed a substantial amount of insurance business with Nationwide that he sold to poor insurance risks. (JA 45) Although Darden flourished from the commissions this business generated, Nationwide suffered significant losses through payment of the resulting claims. (Pet. App. 48a) Because Darden's business practices continued to cause Nationwide to sustain losses, in October, 1980, Nationwide exercised its right to terminate its relationship with Darden. (*Id.*) In December, 1980, Darden chose to reopen his insurance business at the same location he had previously used as a Nationwide agent, selling policies for Nationwide's competitors. (*Id.*) Darden mailed letters to each of the 1,200-1,500 customers he had represented while an agent for Nationwide, advising them that he represented other companies and would like to continue his service for them. (JA 51) Nationwide notified Darden that, because he had violated the terms of the Agent's Agreement, no ASCP payments would be made to him. (Pet. App. 3a-4a)

When his contract was terminated by Nationwide, Darden's net worth was approximately $450,000. He owned an annuity contract and an individual retirement account ("IRA"), but he had chosen to put most of his assets in other forms of investment, including real estate.[2]

[2] These assets included his residence (valued at approximately $120,000), several rental properties (valued at approximately $167,000), his office building (valued at approximately $62,000 net of a mortgage), eight life insurance contracts (with a total cash value of $22,300), mutual fund shares totalling $33,267, and bank deposits of approximately $27,000. Darden's annuity and IRA had values of $9,400 and $8,400, respectively. (Pet. App. 19a; JA 41)

B. The Proceedings Below

Darden brought an action in the United States District Court for the Eastern District of North Carolina, alleging that section 203 of ERISA, 29 U.S.C. § 1053, precluded enforcement of the terms of the Agent's Agreement and seeking to recover the ASCP payments and other relief.[3] The basic facts were not in dispute; after discovery, both parties moved for summary judgment. The case was referred to a magistrate, who recommended that summary judgment be granted for Darden. (Pet. App. 47a)

The district court rejected the magistrate's recommendation and granted summary judgment for Nationwide. (Pet. App. 47a-50a) That court considered " '[t]he total factual context' of Mr. Darden's relationship with Nationwide " in light of common law agency principles and determined that "Darden was an independent contractor and not an employee of Nationwide." (Pet. App. 50a)

[3] In pertinent part, section 203(a) provides that an "employee's" benefits under an "employee pension benefit plan" must vest at least as rapidly as under one of three specified schedules. To the extent that section 203 is applicable, the contractual limitations on ASCP payments may not be enforced against Darden. Darden has never claimed that the termination of his Agent's Agreement was improper, nor is there any dispute that his competition with Nationwide within one year of his termination violated the conditions set forth in the Agent's Agreement for receipt of any ASCP payments. (JA 40 Stip. ¶ 23)

On appeal, the Fourth Circuit agreed that "Darden most probably would not qualify as an employee" of Nationwide under traditional common law principles. (Pet. App. 39a) It stated, however, that "the common-law test for the relationship of master and servant is not the appropriate standard" for defining "employee" under ERISA, because "[i]n interpreting statutory language so as to define the class of persons protected by the statute, a court must take as its 'primary consideration' whether the inclusion of the disputed category of persons would effectuate the 'declared policy and purposes' of the statute." (Pet. App. 40a-41a) Quoting from ERISA's statement of purpose, the court of appeals concluded that Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits," that employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," and that Congress felt it desirable to enact minimum standards "assuring the equitable character of such plans and their financial soundness." (Pet. App. 41a.) The court of appeals found this statement provided "useful guidance in determining whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA." (*Id.*) From this statement, the Fourth Circuit derived a novel, three-part test for determining "employee" status under ERISA:

(1) Whether the claimant "had a reasonable expectation that he would receive the benefits," *i.e.*, whether the "employer" took some action that created a reasonable expectation on the "employee's"

part that retirement benefits would be paid in the future;[4]

(2) Whether the claimant "relied on this expectation," *i.e.*, whether the "employee" remained for "long years," or a substantial period of time, in the "employer's" service and forewent other significant means of providing for retirement; and

(3) Whether the claimant "lacked economic bargaining power to contract out of the forfeiture provisions." (Pet. App. 4a, 41a-42a & n.7)

After finding that the "expectation" element of its test was satisfied in this case, the Fourth Circuit remanded the case to the district court to determine Darden's status as an employee under the other two elements of the newly enunciated test. (Pet. App. 46a) Applying this test on remand, the district court held that Darden was Nationwide's "employee." Although Darden had the financial resources to reduce his reliance on ASCP payments for his retirement, the district court deemed only his annuity contract and IRA to be "financial planning for retirement," found that those two investments did not significantly lessen his reliance on Nationwide payments, and ruled that his reliance was reasonable. (Pet. App. 19a-20a) Accordingly, the district court held that Darden met the

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[4] The Fourth Circuit stated that the limitations on ASCP payments in the Agent's Agreement must be disregarded in making this inquiry, because "it is precisely that sort of employer-imposed condition on the employee's anticipation that Congress intended to outlaw" in ERISA and "[e]mployers may not circumvent that congressional purpose" by arguing that "[the claimant's] expectations were limited by forfeitability provisions." (Pet. App. 42a n.7)

reliance element of the Fourth Circuit's test. Addressing the "bargaining power" element, the district court concluded that Darden's relationship with Nationwide gave him "enough control over his own business activities" that he was *not* "considered an employee under the traditional common law standard," (Pet. App. 20a) but that he did not have sufficient power to bargain over the terms of that relationship. (Pet. App. 21a) On grounds unrelated to the "employee" issue, the district court held that a portion of the ASCP payments were not subject to ERISA. Accordingly, the court entered judgment in part for Nationwide and in part for Darden. (Pet. App. 17a, 31a)

Cross appeals were filed, and the Fourth Circuit affirmed the district court's decision. The Fourth Circuit relied on the test for determining "employee" status that it had previously announced, and again it rejected Nationwide's argument that "employee" status under ERISA should be determined under common law principles. (Pet. App. 5a-8a)[5]

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[5] In order for Darden to sustain his claim that section 203 of ERISA precludes enforcement of the contractual terms for ASCP payments, he must be an "employee," and the ASCP must be an "employee pension benefit plan" (or "pension plan") within the meaning of ERISA. (Pet. App. 4a) The ASCP provided for two forms of payment referred to as Extended Earnings and Deferred Income Incentive Credits ("DCIC"). The district court held that DCIC constituted a "pension plan" subject to the vesting provisions of ERISA, but that Extended Earnings did not. Accordingly, judgment was entered for Darden to the extent the claim pertained to DCIC and for Nationwide to the extent the claim pertained to Extended Earnings. (Pet. App. 31a) Nationwide appealed the district court's holdings that Darden was an "employee" and DCIC a "pension plan." Darden appealed

SUMMARY OF ARGUMENT

The Fourth Circuit's test for "employee" status was predicated not on the language or legislative history of section 3(6) of ERISA, but on that court's view that the term "employee" should be construed "in the light of the mischief to be corrected and the end to be obtained." (Pet. App. 40a) This Court, however, has concluded that the test for "employee" status under federal statutes is the common law test unless Congress has affirmatively expressed a contrary intent. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989). The three other courts of appeals that have considered the meaning of "employee" under ERISA since the Fourth Circuit announced its novel test have uniformly concluded that Congress intended the common law test to govern. *See Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1101-02 & n.6 (5th Cir. 1990) (expressly rejecting the Fourth Circuit test); *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250-51 (6th Cir. 1989) (same); *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (D.C. Cir. 1987).

"Employee" as used in ERISA is a word with an ordinary and settled meaning; that ordinary meaning is wholly at odds with the Fourth Circuit's analysis. This Court recognized in *Reid* that "employee" has

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the district court's holding that Extended Earnings was not a "pension plan." The Fourth Circuit affirmed the district court's judgment in all respects. In response to the petition for certiorari filed by Nationwide raising the "employee" issue, Darden filed a cross-petition seeking review of the status of Extended Earnings under ERISA, which was denied. *Darden v. Nationwide Mut. Ins. Co.*, 922 F.2d 203 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 245 (Oct. 15, 1991) (No. 90-1953).

a settled meaning at common law and that a court must infer that Congress intended to adopt that meaning when it used that term without affirmatively expressing a contrary intent. Nothing in the text or the legislative history of ERISA expresses a contrary intent. The words used by Congress and the pertinent legislative history show only that Congress thought no special explanation was required.

The Fourth Circuit's implicit determination that the common law test was too restrictive to serve Congress' purposes in enacting ERISA is wholly without foundation. Prior to *Reid*, this Court, without a more specific mandate than the remedial purposes of the statute, twice construed the term "employee" to have other than the common law meaning. Congress unequivocally repudiated this Court's construction and amended the statutes to reaffirm the common law meaning. Against that history, Congress' use of "employee" in ERISA without a specific definition demonstrates that it intended the term to have its common law meaning.

The common law test distinguishes between employees and independent contractors on the basis of the extent of the hiring party's control over the worker, as revealed by all the circumstances of the relationship. In contrast, the Fourth Circuit test makes the worker's expectations, reliance, and bargaining power its exclusive focus. By making Darden's status as an independent entrepreneur virtually irrelevant, the Fourth Circuit gave the term "employee" a meaning Congress could not have foreseen, much less intended. Apart from its disregard for Congress' manifest intent, the test conceived by the Fourth Circuit is uncertain in application and unpredictable. Employers could not know in advance which of their workers would be subject to ERISA because employee status would ultimately depend on the nature and extent of investments for retirement made by each worker to whom retirement payments are promised, no matter how independent the business operations of that worker might be.

The common law test of employee status articulated by this Court in *Reid* should be applied to determine employee status under ERISA. Applying that test to the undisputed facts, Darden is not Nationwide's employee.

ARGUMENT

I. The Term "Employee" In ERISA Means An Employee As Defined By Common Law.

The dispositive issue in this case is whether Darden was an "employee" of Nationwide under section 3(6) of ERISA, because the vesting requirements of section 203(a), which the Fourth Circuit held forbid enforcement of the contractual limitations on ASCP payments, are applicable only to "employees" benefitting from "employee pension benefit plans." Section 3(6) states that "the term 'employee' means any individual employed by an employer."

The starting point for interpreting a statute is always "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). The Fourth Circuit disregarded this rule and departed from the ordinary meaning of "employee" when it defined that term by reference

only to a worker's expectation of future payments, reliance on that expectation, and bargaining power.

A. The Ordinary Meaning of the Term "Employee" Is Its Settled Meaning at Common Law.

This Court has held that when Congress uses the term "employee" without expressing a contrary intent, a court interpreting such a statute must infer that Congress incorporated the settled meaning of that word under the common law. *Reid*, 490 U.S. at 739-40. In *Reid*, this Court held that the common law definition governs the meaning of "employee" for purposes of the "work made for hire" provisions of the Copyright Act of 1976, under which the copyrights to "a work prepared by an employee within the scope of his or her employment" are generally owned by the "employer." 17 U.S.C. §§ 101(1), 201(b) (1988). Announcing an interpretive rule of general application, the Court determined that Congress intended the common law definition of "employee" to govern:

> It is . . . well established that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Perrin v. United States*, 444 U.S. 37, 42 (1979). In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine. See, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323 (1974); *Baker v. Texas & Pacific R. Co.*, 359 U.S. 227, 228 (1959) (*per curiam*); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

490 U.S. at 739-40. Finding "[n]othing in the text" of the statute indicating a different meaning, *id.* at 740, the Court held that Congress intended the common law definition of employee to govern. *Id.* at 750-51.

The Court then articulated the factors that must be considered in determining employee status under the general common law:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the [desired result] is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement [Second of

> Agency] §220(2) (setting forth a nonexhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative.

490 U.S. at 751-52 (footnotes omitted). Under the rationale of *Reid*, this same test of common law employee status must also be applicable under section 3(6) of ERISA, because nowhere in ERISA did Congress express any contrary intent.[6]

B. Congress Expressed No Intent in ERISA to Depart from the Common Law Definition of "Employee."

Nothing in the text of any section of ERISA even suggests a meaning of "employee" other than its ordinary meaning under the common law. In defining "employee," Congress used the terms "individual," "employed," and "employer." ERISA § 3(6). The first two terms are not defined in the statute. "Employer" is defined in a way that does not suggest any intent to deviate from its ordinary meaning.[7] Congress' intent to incorporate the common law meaning is clear from the text of ERISA.

[6] As in *Reid* and the cases cited therein, 490 U.S. at 740, the ERISA employee test must be derived from the *federal* common law rather than the law of any particular state, particularly in light of ERISA's express objective of creating uniform national law by broadly preempting state laws relating to employee benefit plans. *See* ERISA § 514, 29 U.S.C. § 1144.

[7] *See* ERISA § 3(5), 29 U.S.C. § 1002(5):

> The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Although one need not resort to the legislative history of ERISA to construe section 3(6), that history confirms that Congress intended to adopt the common law test in defining the term employee. The only substantive discussion of the "employee" definition is a "technical note" that "[t]he definition of 'employee' is intended to encompass any person who has the status of an 'employee' under a collective bargaining agreement." S. Rep. No. 127, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4851; H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4648; 120 Cong. Rec. 3982 (1974). The National Labor Relations Act ("NLRA") specifically affords the right to engage in collective bargaining only to common law employees. *See* 29 U.S.C. §§ 152(3), 157 (1988).[8] Thus, the "technical note" is consistent with the use of the common law test to define employee for purposes of ERISA.

The Fourth Circuit did not (nor could it) cite anything in the text or legislative history of ERISA reflecting any intent by Congress to depart from the common law definition of "employee." The court of appeals relied solely on select portions of the statutory preamble,[9] which does not affirmatively address

[8] *See infra* at 20-21.

[9] The statutory preamble of ERISA is reprinted in its entirety in the appendix to this brief. (A-1a) The Fourth Circuit stated:

> The purposes of ERISA are explicitly set forth in § 2 of the Act, 29 U.S.C. § 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits." Because

the "employee" issue. The cited language—referring to the need to protect "employees" and the role of pension plans in "the stability of employment"—in fact reflects ERISA's concern with defining parties' rights and duties when pension and welfare benefits are provided pursuant to a conventional employment relationship. ERISA is *not* concerned with redefining the well-understood scope of that relationship.

C. Congress' Incorporation of the Common Law Test in ERISA Has Been Clear to Other Courts of Appeals.

The three other courts of appeals that have construed section 3(6) properly focused on the statutory language of ERISA. In *Holt*, the administrators of a pension plan declined to pay benefits to a plan participant on the grounds that her service was insufficient to meet the ten year vesting requirement of the plan. The employer had originally retained her as an "independent contractor" at a time when the employer had a policy against hiring part-time employees. The issue was whether the participant's first year of service, ostensibly as an independent contractor, was service as an "employee" and therefore could be counted toward satisfying the vesting requirement. 811 F.2d at 1534-35. The D.C. Circuit concluded:

> employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual employees and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

(Pet. App. 41a)

> The absence of a comprehensive definition of "employee" in ERISA and other features of that legislation indicate plainly enough that Congress intended the Secretary of the Treasury and the Secretary of Labor, who were administrators of various ERISA provisions, to continue their practice of defining "employee" in terms of common law agency principles.

Id. at 1538 n.44. The court found that the Treasury Department's practice was to apply the "usual common law rules,"[10] noted that Treasury Department regulations implementing the vesting provisions of section 411 of the Internal Revenue Code also apply to the parallel vesting provisions of section 203 of ERISA, and observed that the Labor Department is prohibited from issuing inconsistent regulations. 811 F.2d at 1538 n.44, citing ERISA § 3002(c), 29 U.S.C. § 1202(c) (1988); H. Rep. No. 1280, 93d Congress, 2d Sess. 268 n.1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5050. The court also noted that the common

[10] The Internal Revenue Service applies the employment tax definition of common law employee under the tax qualification rules for pension plans, including the vesting provisions, *see, e.g., Professional & Exec. Leasing, Inc. v. Commissioner*, 89 T.C. 225, 231 & n.10 (1987), *aff'd*, 862 F.2d 751 (9th Cir. 1988) (IRS has generally relied on common law test to determine employee status); Rev. Rul. 68-303, 1968-1 C.B. 165, 166; Rev. Rul. 60-379, 1960-2 C.B. 156, 157-58, other than where Congress has enacted a specific exception. *See* Internal Revenue Code §§ 401(c) (self-employed persons), 414(n) ("leased" employees), 414(o) (other persons specified by regulation), 7701(a)(20) (full-time life insurance salesmen as defined in Code § 3121(d)(3)(B) and Treas. Reg. § 31.3121(d)-1(d)(3)).

law test is applied to determine employee status under the NLRA. 811 F.2d at 1538; *see infra* at 20.

The D.C. Circuit in *Holt* ruled that "all relevant circumstances are to be examined and evaluated," under the common law test, but that "the right of one party to control not only the result to be achieved by the other, but also the means and manner of performing the task," is the "most critical factor." 811 F.2d at 1539. Both the employer's "well-nigh unbridled control" over the worker, as well as her lack of specialized skills, use of the employer's premises and equipment, and compensation by an hourly wage, persuaded the court of appeals she was an "employee" at common law. *Id.* at 1539-41. *See also Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553-54 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 347 (1990) (applying the test articulated in *Reid* pursuant to the holding in *Holt* that the common law test governs under ERISA).

The reasoning of *Holt* has also been adopted by the Fifth and Sixth Circuits. *Wolcott* involved an issue identical to that in this case: whether a former insurance agent was Nationwide's "employee" and, therefore, entitled to ASCP payments by reason of ERISA's vesting requirements notwithstanding the contractual limitations on those payments. 804 F.2d at 249-50. In *Penn*, a structural designer was discharged as a regular employee and retained as an "independent contractor." The employer terminated its pension plan, and the issue was whether the designer was entitled to a fully vested pension by reason of being an "employee" at the time of the plan termination. 898 F.2d at 1098-99. The Fifth and Sixth

Circuits relied on the D.C. Circuit's reasoning in *Holt*, rejected the Fourth Circuit's test, and applied the common law test to determine employee status under ERISA. *Id.* at 1101-02 & n.6 ("We agree that because Congress provided no specific statutory definition of 'employee' under ERISA, we properly apply the common law of agency."); *Wolcott*, 884 F.2d at 250-51. Applying that test, both courts of appeals considered the right of control, together with a variety of other factors in holding that the claimants were independent contractors. *Penn*, 898 F.2d at 1102-03, citing *Reid*; *Wolcott*, 884 F.2d at 251.

D. The Common Law Definition of "Employee" is Consistent with the Purpose of ERISA.

Each time this Court has interpreted a statute as having a definition of "employee" broader than the common law definition and the only authority for such an interpretation was the general purpose of the statute, Congress has unequivocally reaffirmed that the common law definition was what it had intended.

In devising its test of employee status, the Fourth Circuit cited *United States v. Silk*, 331 U.S. 704, 713-14 (1947) (defining "employee" for purposes of the Social Security Act), and *NLRB v. Hearst Publications*, 322 U.S. 111, 120-21 (1944) (defining "employee" for purposes of the National Labor Relations Act). Both of those cases interpreted the term "employee" expansively in light of the perceived purposes of the legislation being interpreted. (Pet. App. 40a-41a) Although, the Fourth Circuit cited *Silk* and *Hearst*, it failed to consider Congress' reaction to each of those decisions; had it done so, it would have concluded that the common law definition of "employee" is consistent with the purpose of ERISA.

The NLRA originally defined "employee" by stating (in pertinent part) that the term included "any employee." Ch. 372, § 2, 49 Stat. 450 (1935), 29 U.S.C. § 152(3) (1940). This Court in *Hearst* reversed a determination that certain "newsboys" were not employees under the NLRA, stating that common law-concepts should not restrict the scope of the term "employee;" instead, the term should be "understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 U.S. at 129.

Congress responded by repudiating *Hearst* and amending the NLRA specifically to exclude from its coverage "independent contractors" as determined under the common law test. *See* Labor Management Relations Act, 1947, ch. 120, title V, § 501, 61 Stat. 161, 29 U.S.C. § 142(3) (1952); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). The legislative history of this amendment confirmed that the proper test was and had been the common law test:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire .... It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meaning that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up [in its administrative decision in *Hearst*]. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors" .... It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 292, 309 (1948).

Silk provoked a similar response. The Social Security Act originally defined "employee" only by stating that the term "includes an officer of a corporation." Ch. 531, title XI, § 1101, 49 Stat. 647 (1935), 42 U.S.C. § 1301(a)(6) (1940), Internal Revenue Code §§ 1426(d), 1607(i) (1940). This Court gave additional content to that definition in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947). In *Silk*, the Court held that certain truck drivers were independent contractors but that certain "unloaders" of coal from railroad cars were "employees" under the Act. In *Bartels*, the Court held that certain dance band members were not "employees" of the dance halls where they played. Although the Court considered many of the factors of "employee" status developed under the common law standard, *see Bartels*, 332 U.S. at 130-32; *Silk*, 331

U.S. at 716-19, it also suggested that technical insistence on a common law standard of control should not constrain application of the Social Security Act in light of the social ends Congress sought to achieve. *See Bartels*, 332 U.S. at 130; *Silk*, 331 U.S. at 710-14. The Court then concluded that "those who as a matter of economic reality are dependent upon the business to which they render service" should be treated as "employees." *Bartels*, 332 U.S. at 130; *see Silk*, 331 U.S. at 713-14.

In response to these decisions, the Treasury Department and the Federal Security Agency proposed new regulations to embody this "economic reality" test.[11] Before those regulations could take effect, however, Congress repudiated them by confirming that the statutory definition of "employee" included only those individuals who satisfy the "usual common law rule." Social Security Act, ch. 468, § 1(a), 62 Stat. 438 (1948) (current version at 42 U.S.C. § 410(j)(3) (1988), Internal Revenue Code §§ 1402(d)(2), 3121(d)(2)); *see Enochs v. Williams Packing & Navig. Co.*, 370 U.S. 1, 3 (1962). The legislative history stated:

> The joint resolution would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.
>
> * * *
>
> The pending resolution will maintain the

[11] 12 Fed. Reg. 7966 (1947).

> moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then *the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.*

S. Rep. No. 1255, 80th Cong., 2d Sess. 1-2 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1752, 1753 (emphasis added). Thus, in the context of a statute, the remedial purpose of which could hardly be stronger, Congress squarely rejected the notion that such purpose required the common law test of employment to be expanded. Congress rejected the definition in the proposed regulation, because its "basic principle—economic reality—. . . is a dimensionless and amorphous abstraction," and reaffirmed the common law standard, which reflects "established standards of law which frame and limit its application." *Id.* at 12, *reprinted in* 1948 U.S.C.C.A.N. at 1764.[12]

The device used by the Fourth Circuit to justify its test—an implicit finding that the common law test is too restrictive to effect the purposes of ERISA—is wholly without foundation. As under the NLRA and the Social Security Act, the purpose of ERISA is evident from its operative provisions: to afford certain rights to "employees." The scope of that term, as

[12] This history is reviewed in *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 182-90 (1970).

intended by Congress, is clear from the text and legislative history of ERISA. The common law test of employee status is in total harmony with the purposes of ERISA.

The history of Congress' use of the term and the interpretive principle established in *Reid* show that Congress dictated use of the common law standard for determining employee status under ERISA. By seeking an "employee" definition in the purposes of ERISA, the Fourth Circuit disregarded the ordinary meaning of the text of section 3(6). That court usurped the function of Congress[13] and in that process conceived an erroneous meaning for the term "employee." This Court should correct the Fourth Circuit's error.

II. The Fourth Circuit Test Produces Untenable and Unpredictable Results.

A. The Test Abandons the Fundamental Distinction Between Employees and Independent Contractors.

The Fourth Circuit correctly observed that the "principal element of the common law standard is the

[13] In contrast, this Court has consistently enforced the terms of the statute and has declined to modify judgments made by Congress in enacting ERISA. *See, e.g., Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990) (declining to create an exception to the unqualified ERISA prohibition on the assignment or alienation of benefits for employee malfeasance or criminal misconduct); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18 (1989) (declining to expand statutory definition of "participant" beyond its "natural reading" to reach claimants without a colorable entitlement to benefits); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

extent of one party's right to direct and control the performance of the other." (Pet. App. at 37a-38a) Under the common law, as in ordinary usage, employees differ from independent contractors, who agree only to accomplish results and retain control over the manner in which they attempt to do so. Restatement (Second) of Agency §§ 2, 220 cmt. e (1958). For example, in *Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324 (1974), a case construing the Federal Employers Liability Act, this Court adopted the Restatement definition of common law "employee"[14] as a worker "who with respect to the physical conduct in the performance of the services is subject to the [hiring party's] control or right to control."[15]

This Court stated in *Reid* that the common law test considers "the hiring party's right to control the manner and means by which the [desired result] is accomplished," and enumerated a number of "other factors relevant to this inquiry." 490 U.S. at 751-52.[16] The hiring party in *Reid* did exercise some control over a sculpture being produced by an artist, but the Court cautioned that "the extent of control the hiring party exercises over the details of the product is not

[14] *See also Reid*, 490 U.S. at 752 n.31 ("In determining whether a hired party is an employee under the general common law of agency, we have traditionally looked for guidance to the Restatement of Agency.").

[15] *See also General Bldg. Contrac. Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 393 (1982) (control is "central" to master-servant relationship); *Logue v. United States*, 412 U.S. 521, 527 (1973) (same); *Webb*, 397 U.S. at 192 (noting "primacy" of control); *Linstead v. Chesapeake & Ohio R. Co.*, 276 U.S. 28, 33-35 (1928) (treating control as dispositive).

[16] *See supra* at 13-14.

dispositive." *Id.* at 752. The artist in *Reid* was found to be an independent contractor because, *inter alia*, his occupation required skill, he supplied his own tools, and he worked in his own studio beyond the daily supervision of the hiring party. *Id.* at 752. The hiring party retained the artist for only a short period of time, during which the artist did not have to accept additional assignments, was free to decide when and how long to work, had total discretion in hiring and paying assistants, and was paid for completion of the job (not time spent on it). *Id.* at 752-53.

The common law test does not require that the extent of a hiring party's control be assessed with indifference to the circumstances affecting the working relationship. This Court has long recognized that Congress expects a "realistic" application of the common law test under federal statutes. *Webb*, 397 U.S. at 186 (reviewing legislative reaction to *Silk*, discussed *supra* at 22-23). *Reid* shows that the extent of the hiring party's control over the worker is revealed by the totality of those circumstances. Unlike the Fourth Circuit's test, the common law takes the circumstances of the parties' relationship into account within the framework of the sensible distinction between independent contractors, who promise only a result or reasonable efforts to deliver a result, and employees, who agree to perform services in the manner their employer directs.

By abandoning the common law test, the Fourth Circuit also abandoned this fundamental distinction[17]

[17] One court has questioned whether *any* worker promised a retirement benefit would fail to be treated as an "employee" under the Fourth Circuit test. *See Sica v. Equitable Life Assur. Soc'y*, 756 F. Supp. 539, 542 (S.D. Fla. 1990). In that case, an insurance agent *opposed* characterization as an ERISA "employee" because he sought remedies for denial of disability benefits under state law, which would be preempted if ERISA applied. The court rejected the Fourth Circuit test and adopted the common law test. *Id.* at 542.

and declared that "Darden's alleged status as an independent entrepreneur [had] little to do with the relevant inquiry . . . ." (Pet. App. 7a) Logically applied, the Fourth Circuit's test would treat owners of automobile dealerships, fast food franchises, and other retail distributors of goods or services primarily produced by another company as "employees" if they had the requisite expectations, reliance, and lack of bargaining power.[18] In so doing, the Fourth Circuit's test gives the term "employee" a meaning Congress could not have foreseen, much less intended, when it enacted ERISA.

B. The Test Is Uncertain in Application and Unpredictable.

In enacting ERISA, Congress had a particular concern that the law governing employee benefit plans be certain and predictable.[19] The Fourth Circuit's test

[18] The economic dependence of the contractor on the business is *not* the determinative factor under the common law test. As the Senate Finance Committee observed when it repudiated a proposed regulation that would have made "economic realities" the test for employee status under the Social Security Act, "[t]he rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person?" S. Rep. No. 1255, 80th Cong., 2d Sess. 10 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1752, 1762, *quoted in Webb*, 397 U.S. at 187-88.

[19] This Congressional purpose is evident in the preemption provisions of section 514 of ERISA, 29 U.S.C. § 1144, which gen-

is at odds with that concern. The stated objective of that test was to permit the court to decide "whether an individual who does not fit within the traditional concept of employee status should nonetheless be considered an employee in the context of ERISA." (Pet. App. 41a) The test fails to impose principled restraints on that result-driven judicial determination. Such a test lacks the prospective certainty Congress intended.

The distinctions in "employee" status that the Fourth Circuit test might draw between frugal and spendthrift contractors compound the uncertainties of the test. The reliance element of the test [20] requires a determination whether the contractor *actually relied* on the expected payments to provide for retirement. (Pet. App. 6a-7a, 42a-43a) That reliance may vary significantly from contractor to contractor; from time to time it could even vary significantly as to any particular contractor. It is improbable that most businesses would have enough knowledge of their contractors' personal financial planning to make an advance determination of that reliance. Thus, insurance agents with whom Nationwide has identical working relationships would be treated differently under the Fourth Circuit's test based upon their individual in-

erally displace state law relating to employee benefit plans in favor of uniform federal law. *See, e.g., Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987); H. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650. That purpose is also implicit in the complex and detailed statutory provisions of this "comprehensive and reticulated" statute. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

[20] As discussed *supra* at 7, this element considers whether the claimant relied on the future payments to provide for retirement.

vestment decisions and wealth. Such a result would be absurd. The Fourth Circuit's test would disrupt any certainty as to the scope of ERISA. It would also have the anomalous consequence of discouraging workers from establishing formal retirement arrangements, or otherwise saving for retirement, outside the workplace.

The common law test brings greater certainty to the "employee" issue, because it is an established standard that has been applied to innumerable factual situations for a variety of legal purposes. This body of precedent gives content and bounds to the common law standard.[21] Because of the long history of the actual application of this standard, it provides a predictability and certainty that the Fourth Circuit test cannot approach.[22]

[21] This predictability was important to Congress when it reinstated the common law rules under the Social Security Act. *See supra* at 23.

[22] The Fourth Circuit's unprecedented test of "employee" status may produce harsh results for affected individuals. For example, only a "self-employed individual" may establish the type of qualified plan commonly referred to as a Keogh plan. *See* Internal Revenue Code § 401(c)(1)(A). If insurance agents like Darden established Keogh plans but were determined to be "employees" rather than self-employed under the Fourth Circuit test, their Keogh plans might be disqualified and the agents subjected to back tax liabilities. In addition, Nationwide agents are not presently taxed on ASCP accruals because that promise is a general, unfunded obligation of Nationwide. *See generally* Rev. Rul. 60-31, 1960-1 C.B. 174. If the agents were found to be "employees" and the ASCP were otherwise subjected to ERISA, compliance with the ERISA trust, vesting and funding requirements might cause the agents to be taxed on those accruals in advance of actual receipt of ASCP payments. *See* IRS Notice

III. Darden Was Not Nationwide's "Employee."

The basic facts of this case as found by the district court are not in dispute:

> The plaintiff maintained an office in Spring Lake, North Carolina, at his own expense. The plaintiff was free to solicit insurance sales wherever, whenever, and from whomever he wished. The plaintiff was free to hire and fire his office help. The plaintiff paid his own business expenses. The plaintiff received compensation solely through commissions rather than as a salary from the defendants. The plaintiff was ineligible for such employee benefits as accident and health insurance, sick leave, vacation pay, jury duty pay, and employee pension or profit sharing plans. Nationwide withheld no taxes from the plaintiff's commissions. The plaintiff reported his own income, and paid taxes as an independent businessman. The plaintiff reported his commission income and business expenses on IRS forms prescribed for sole proprietorships. The plaintiff maintained an individual retirement account. Throughout all the agreements between the plaintiff and Nationwide, the plaintiff is listed as an independent contractor and not an employee. The plaintiff paid the fees for all his state agent's licenses. The plaintiff was free to incorporate his agency. He determined his own hours. Finally, it was primarily through the

87-13, Q&A-25, 1987-1 C.B. 432, 444 (discussing "section 457 plans," which are taxed on the same basis as the ASCP).

> plaintiff's own efforts, ingenuity, and good business sense that he made money, and not through any employment relationship with Nationwide.

(Pet. App. 48a-49a) Darden had the opportunity to provide for his retirement security through his own entrepreneurial efforts, and he in fact succeeded in developing substantial personal assets. (Pet. App. 20a)

Under the test of employee status articulated in *Reid* and applicable for purposes of ERISA, a court should consider "the hiring party's right to control the manner and means by which the [desired result] is accomplished" and other relevant factors including those enumerated by this Court. 490 U.S. at 751, quoted *supra* at 13-14. Taking into account Nationwide's right to control the sale of insurance by Darden and all the facts of his relationship with Nationwide, the district court found that Darden was not Nationwide's common law "employee."[23] (Pet. App. 48a-50a) When Darden appealed that judgment, the Fourth Circuit agreed that, under the common law test, "Darden most probably would not qualify as an employee." (Pet. App. 39a) Applying the test to the undisputed facts, Darden is not an "employee" of Nationwide.

[23] The district court's decision accords with the result in every other case that has applied the common law test to determine whether a former Nationwide agent was an "employee" for ERISA purposes. *See Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245 (6th Cir. 1989); *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam) (Pet. App. 54a); *Sciara v. Nationwide Ins. Cos.*, No. 87-2815-4A (W.D. Tenn. March 30, 1990) (Pet. App. 59a); *Harlow v. Nationwide Mut. Ins. Co.*, No. N-84-503 (JAC) (D. Conn. June 19, 1987) (Pet. App. 68a).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the court of appeals with instructions to enter judgment for Nationwide.

Respectfully submitted,

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APPENDIX

Employee Retirement Income Security Act of 1974

§ 2 Congressional findings and declaration of policy

(a) Benefit plans as effecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination

of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Supreme Court, U.S.
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DEC 23 1991
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No. 90-1802

In The

SUPREME COURT of the UNITED STATES

October Term, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Is the Petitioner Darden an employee under the terms of the Employee Retirement Income Security Act, 29 U.S.C. Sec. 1002(6)?

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No. 90-1802

In The

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October Term, 1990

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and NATIONWIDE LIFE INSURANCE COMPANY,

Petitioners,

v.

ROBERT T. DARDEN,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

THE FACTS

The plaintiff worked as an insurance agent for Nationwide from September, 1962

until November, 1980. (JA-37)[1]. During this period, Darden and Nationwide entered into a series of eight (8) Agent's Agreements, the most recent of which became effective January 1, 1977. (JA-37). The Agent's Agreement provided that Darden was to exclusively represent Nationwide. (JA-38).

The Agent's Agreement, along with other documents given to the plaintiff during the time he served as an agent for Nationwide, provided for a retirement plan for Nationwide agents known as the Agent's Security Compensation Plan. (JA-11-18). The Agent's Security Compensation Plan was composed of the Deferred Compensation Incentive Credit portion and the Extended

---

[1] References to the Joint Appendix are designated "JA", and references to the Petition for Writ of Certiorari are designated "Pet. App."

Earnings portion. Participation in the Security Compensation Plan was limited to agents with at least five years of service with Nationwide. (JA-38). Under the Deferred Compensation Incentive Credits, an eligible agent was credited with deferred compensation incentive credits according to a scale based on each year's total renewal commissions. (JA-11-12). Each year amounts based upon the formula are credited to the agent's account in a group annuity contract with Nationwide Life Insurance Company. (JA-24a). The Plan contained a vesting schedule known as the "Rule of 45." (JA-13). An agent whose employment with Nationwide terminated would be eligible to begin receiving a part of the deferred compensation portion of the Plan at age 50 with the percentage received gradually increasing up to 100% at age 60. (JA-15).

The Fourth Circuit in Darden v. Nationwide Mut. Ins. Co., 1122 F.2d 203 (4th Cir. 1991) (Darden II), found that the Extended Earnings plan was not a retirement plan subject to ERISA. (Pet. App. 10a-12a).

An agent could elect various methods of payment of benefits under the Agent's Security Compensation Plan. (JA-15-16). Darden elected to have his benefits payable as a life only annuity. (JA-34a-35a). The most recent agent's benefit statement which Darden received prior to his termination indicated that as of December 31, 1979, he had accumulated $28,664 in the Deferred Compensation Incentive Credits plan and $65,706 in the Extended Earnings plan. (JA-34a).

Under paragraph 9 of the Agent's Agreement, the agent for Nationwide had the right to cancel the Agreement at any time

after written notice. (JA-11). Paragraph 11(f)(1) of the Agent's Agreement provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan would cease and terminate if, within one year of cancellation of the Agent's Agreement, the agent engaged in the fire, casualty, health and life insurance business within a 25-mile radius of the former business location of the agent. (JA-17). Paragraph 11(f)(3) provided that the liability of Nationwide for benefits under the Agent's Security Compensation Plan should cease and terminate if the agent at any time after cancellation of the Agreement induced a policyholder of Nationwide to cancel or place any insurance contract in force with Nationwide or furnish the name of a policyholder or a competitor. (JA-17).

Although Darden sold several types of insurance, including life, homeowner and commercial insurance, his predominant market was automobile insurance. (JA-39). Darden testified that North Carolina agents writing automobile liability insurance coverage, which is mandatory in North Carolina, cannot discriminate against drivers based on age, sex, credit or bad driving records. (JA-44). If Nationwide received an application for automobile liability coverage for a driver it did not wish to cover, then coverage would be ceded to the North Carolina Reinsurance Facility in which companies writing automobile liability insurance coverage in North Carolina participated. (JA-44-45).

Since Darden's office was located close to Fort Bragg, many of his customers were military personnel. Because of their

age, automobile liability insurance coverage for nearly all military personnel was ceded to the North Carolina Reinsurance Facility. (JA-45).

Nationwide did not want Darden serving military personnel because coverage for them was ceded to the Reinsurance Facility. It took a number of steps to discourage him from doing so. The district and regional manager advised Darden to move his office to downtown Fayetteville away from Fort Bragg and to close his office during the hours of 11:00 a.m. to 12:30 p.m. during the military lunch hour. (JA-45-46). Darden declined to discontinue serving military personnel.

Darden was terminated by Nationwide in a letter dated October 29, 1980. (JA-23). Upon his termination, Darden turned over to Nationwide, pursuant to the Agent's

Agreement and the termination letter, all of the Nationwide policy files in his office which consisted of approximately 1200 to 1500 files. (JA-48). Nationwide then distributed out the business which they wished to retain to existing agents and steered the undesirable business to Darden. (JA-25). A memo dated December 11, 1980 between Nationwide supervisory employees stated:

> Fortunately, Agent Darden has acquired a voluntary company and is in the process of transferring the business to them. This action is definitely in our best interest. (JA-26).

Following his termination, Darden went to work as an independent insurance agent representing various insurance companies working out of the same office he had maintained as a Nationwide agent. (JA-40). Nationwide then terminated his retirement

benefits pursuant to paragraph 11(f) of the Agent's Agreement. (JA-41).

SUMMARY OF ARGUMENT

In Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986) (Darden I), the Fourth Circuit formulated a three-prong test for determining whether Darden was an employee under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1001 et seq. The Fourth Circuit rejected the common law agency test and used a standard based on the purposes of ERISA as set forth in the statute. (Pet. App. 40a).

The Fourth Circuit was correct in rejecting the common law agency test. This test distinguishing between an employee and an independent contractor was derived from common law of vicarious liability. Experiences of the courts in applying the common law test to vicarious liability

issues has been unpredictable and distinguished by decisions based on unimportant and minute details. Common law agency standards have been transported into statutory definitions of employment with no success at clarity or predictability since the issues arising from vicarious liability are entirely different from those arising under various statutes. The experience of the courts using the common law agency test for distinguishing between an employee and an independent contractor under worker's compensation has proven to be a failure and has generated endless litigation.

The three-prong test derived from the purposes of ERISA by the Fourth Circuit produces a standard that is logically relevant and directly related to the purposes of ERISA. Since it is directly related to the purposes of ERISA, it is a

more predictable and logical standard than the common law agency principles which are unrelated to the purposes of ERISA.

Based on the factors considered by the Fourth Circuit in Darden I, as well as additional factors related to the purposes of ERISA, Darden is an employee under the provisions of ERISA and is within the class protected by the nonforfeitability provisions of the statute.

ARGUMENT

I. THE COMMON LAW AGENCY TEST SHOULD NOT BE USED TO DEFINE "EMPLOYEE" UNDER ERISA.

The common law distinction between employees and independent contractors arose as a method of determining whether one entity is liable for the tortuous conduct of another entity. Legal scholars have not agreed on the origin of the doctrine of vicarious liability. Harper, James and

Gray, The Law of Torts, 2nd ed., Sec. 26.2 (1986). The authors of the above treatise wrote that it was not necessary to resolve its historical origin since "it is to be understood now principally in terms of its effectiveness in achieving contemporary social objectives, rather than on grounds of conceptual appeal or the claims of history." Id., Sec. 26.2, p. 10.

The principal issue courts have addressed in discussing vicarious liability is why an employer, who is not at fault, should be liable for the conduct of a negligent employee. Various reasons have been utilized, but none has been entirely satisfactory. For example, expanding liability to the employer would allow injured parties a better chance of recovery. Mechem, Law of Agency, 2nd ed., Sec. 1856 (1914). But one commentator has

denounced this as an effort to reach a deep pocket. T. Baty, Vicarious Liability 154 (1916).

A combination of factors appear to be the best explanation for extending liability to employers, including the impetus it provides to employers to prevent accidents, compensation to victims, and the desirability of spreading the costs of injuries. Obviously, significant costs are incurred by various industries. Courts are not well equipped to deal with the complex issues which arise. However, some courts have been forthright in recognizing the problems. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 175 (2nd Cir. 1968).

Given the complexity and controversial nature of the problems inherent in vicarious liability, it should be no

surprise that results vary among the courts. Harper, James, and Gray in their Treatise stated: "The cases are by no means harmonious. . . . The result has often been made to turn on trivial factual differences." Harper, James, and Gray, Sec. 26.11, p. 62, fn. 6.

This Court specifically recognized the unreliability and unpredictability of the common law agency test for distinguishing between an employee and an independent contractor in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In its opinion the Court stated:

> Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field determining vicarious liability in tort. It becomes more so when

> the field is expanded to include all of the possible applications of the distinction.

322 U.S. at 121.

The issues the courts have wrestled with over the past century concerning vicarious liability are not remotely related to the issues Congress addressed in ERISA. Under the law of agency, control is considered a key factor in assessing the employer with damages caused by an employee. This seems logical in most cases since control implies some degree of fault on the part of the employer for torts of the employee. Under ERISA, fault is not an issue.

Since the rationale for vicarious liability bears no relationship to the purposes of ERISA, results of using the common law test have been unpredictable. In Plazzo v. Nationwide Mut. Ins. Co., 697

F.Supp. 1437 (N.D. Ohio 1988), rev'd. 892 F.2d 79 (6th Cir.), cert. denied, 111 S.Ct. 370 (1990), the trial court using the common law test found that Plazzo, a Nationwide agent, was an employee under ERISA after a seven-day bench trial. The Sixth Circuit reversed the trial court because they had previously overruled another trial court's determination using a combination of the common law and Darden factors that a Nationwide agent was an employee in Woolcott v. Nationwide Mut. Ins. Co., 884 F.2d 245 (6th Cir. 1989). In Darden's case, the U.S. Magistrate found that Darden was an employee using the common law test but the trial court overruled him in issuing summary judgment for Nationwide. In Holt v. Winipisinger, 811 F.2d 1532 (D.C. Cir. 1987), the Court reversed a finding by the trial court using

common law agency principles that the plan participant was not an employee under ERISA.

This Court had occasion to pass on the question of whether an insurance agent was an employee or an independent contractor using the common law agency test in NLRB v. United Ins. Co., 390 U.S. 254 (1968). In its opinion, the Court relied on the "total factual context" and certain "decisive factors", 39 U.S. at 258, in finding that the insurance agents were employees under the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq. The Magistrate in this case relied heavily on NLRB v. United Ins. Co., 390 U.S. 254, in finding that Darden was an employee under ERISA.

This Court gave little guidance as to the meaning of "total factual context" or how to determine which were "the decisive

factors." Without any policy guidelines except those contained in the vicarious liability doctrine which bears no relationship to policies under the National Labor Relationship Act, the Court faced a difficult task in rationalizing its decision.

The Restatement (Second) of Agency Comments Sec. 220(c) (1958) states that the relationship of master and servant is not capable of exact definition, but it is necessary to do so in order to ascertain the liability of the master to third persons. The Comments, Sec. 220(1)(g) note that the tests given in the Restatement are used under Employers' Liability Acts and the Worker's Compensation Acts but "[b]eyond this there is little uniformity of decision." This Comment further found that persons have been determined to be

employees under federal and state Wage and Hours Act, the purpose of which is to raise wages and working conditions, who were clearly not servants under the Restatement test.

The history of the attempt to distinguish between employees and independent contractors in worker's compensation laws should be considered in defining an employee under ERISA. Larson's Workmen's Compensation Law (1991) relates that the definition of the term "employee" for purposes of vicarious liability, worker's compensation, labor legislation, social security, and other enactments has "probably produced more reported cases than any definition of status in the modern history of law." A. Larson, Larson's Workmen's Compensation Law, Sec. 43.10. Larson points out that there was little

disagreement over the test distinguishing employment from independent contractor status. The Treatise continues:

> It is, however, the application of these rules to an infinite variety of borderline cases that brings about this amount of litigation and disagreement. It has been said that precedents may be found on both sides of almost every situation in which the question could arise. The explanation of this paradox- agreement on principles and disagreement in actual decisions - seems to lie partly in the relative weight given to the various tests of status and partly in the extent to which courts define status in view of the purpose served by the particular legislation rather than as a static concept."

Larson's, Sec. 43.10.

Larson explains the problems which have arisen under workers' compensation laws as follows:

> The source of most of the difficulty in adopting bodily the common-law definition of servant for compensation purposes can now be easily explained, in terms of the above analysis: <u>The purpose for which the definition is used in compensation law is entirely different from the common-law purpose</u>.

Larson's, Sec. 43.42 (emphasis in original).

The right to control test is gradually giving way to the relative-nature-of-the-work test in worker's compensation because of the logical irrelevance of the right to control test and the vagueness of the test. There are no rules as to the weight to be given to the various factors in the common law agency test and the right to control is a conclusion seldom capable of direct proof. Larson's, Sec. 45.10.

Applying the right to control test to Darden leads to the conclusion he is an employee. The trial court found Darden lacked sufficient bargaining power to bargain over the terms of his agreement with Nationwide. (Pet. App. 20a-21a). The

Court cited an outline of changes in the Agent's Agreement made in 1980 which advised agents that "[a]s in the past, our position will be that any agent refusing to sign the new Agreement will have his or her existing Agreement cancelled as of 1/1/81." (JA-21a). Nationwide was in a position to "allow" Darden to appear to be an independent contractor while retaining the right to maintain control over him, including the right to terminate him at will.

In NLRB v. United Ins. Co., 390 U.S. at 259, this Court looked to practical realities in holding that the insurance agent was an employee. The Court stated:

> Probably the best summation of what these factors mean in the reality of the actual working relationship was given by the chairman of the board of respondent company in a letter to debit agents about the time this unfair labor practice proceeding arose: "if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final [sic]."

Darden and the insurance agents in NLRB v. United Ins. Co., 390 U.S. 254 had no control over the terms of their agreements with the insurance companies. In Darden's case, this included the inability to bargain over nonforfeitability of pension rights. If the common law right to control is applied as it was in NLRB v. United Ins. Co., 390 U.S. at 259, Mr. Darden is an employee under ERISA.

II. DARDEN IS AN EMPLOYEE UNDER THE PROVISIONS OF ERISA.

A. The proper standard for defining employee under ERISA should be based on the purposes and functions of ERISA.

Darden brought this action pursuant to Sec. 502(a)(1) of ERISA, 29 U.S.C. 1132(a)(1) which provides that a "participant" may sue to recover benefits due him or her under a retirement plan. The statute defines "participant" as any "employee or former employee" who is or may become eligible to receive a benefit from an employee benefit plan covering employees of such employer. 29 U.S.C. Sec. 1002(7). The statute then defines an employee as "any individual employed by an employer." 29 U.S.C. Sec. 1002(6).

Webster's Dictionary defines "employ" as "to use or engage the services of - a lawyer to straighten out a legal tangle." Webster's Third New International Dictionary (1966). The term "employed by" in the statute includes "any individual" whose services are engaged by an employer.

The term "employer" includes persons acting directly as an employer or indirectly as such in the interest of the employer in relation to an employee benefit plan. 29 U.S.C. Sec. 1002(5).

Although the definition of employee is the question before the Court, it is used to determine who is a participant so that its significance is to determine the extent of coverage of ERISA. Thus, a functional approach to the issue is appropriate.

In Community For Creative Non-Violence v. Reid, 490 U.S. 730 (1989), this Court held that the "work for hire" provisions in Section 101 of the Copyright Act of 1976, 17 U.S.C. Sec. 101 et seq., should be interpreted using common law agency law meaning. The Court stated:

> Nothing in the text of the work for hire provisions indicates Congress used the words "employee" and "employment" to

describe anything other than "'the conventional relation of employer and employee,'" Kelley, supra, at 323, 42 L.Ed.2d 498, 15 S.Ct. 472 [Kelley v. Southern Pacific Co., 479 U.S. 318 (1974)], quoting Robinson, supra, at 94, 59 L.Ed. 849, 35 S.Ct. 491 [Robinson v. Baltimore & Ohio R. Co., 237 U.S. 84 (1915)]; compare NLRB v. Hearst Publications, Inc., 322 U.S. 111, 124-132, 88 L.Ed. 1170, 64 S.Ct. 851 (1944) (rejecting agency law conception of employee for purposes of the National Labor Relations Act where structure and context of statute indicated broader definition).

490 U.S. at 740.

In NLRB v. Hearst Publications, Inc., 322 U.S. 111, this Court stated that one purpose of the National Labor Relations Act, 29 U.S.C. Sec. 151, is to avoid obstructions to the free flow of commerce which result from strikes and labor unrest. The Court pointed out that labor unrest can occur as a result of disputes between some who are technically independent contractors

and their employers as well as those who are employees, for those purposes, and their employers. Inequality of bargaining power, dependence on a daily wage, and inability to resist arbitrary treatment may characterize the working conditions of one group as well as the other. The Court then stated:

> In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, these characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

322 U.S. at 128.

Congress' findings and declarations of policy of ERISA, 29 U.S.C. Sec. 1001, represent a major change for pension plans

from being a matter of private contract between employers and employees governed by the common law to a matter of national public interest affecting the lives of millions of employees. One of the principal goals of ERISA as expressed by Congress was to address the problem ". . . of many employees with long years of employment [who] are losing anticipated retirement benefits owing to the lack of vesting provisions . . ." 29 U.S.C. Sec. 1001. To meet this problem, ERISA provided that a participant's pension became nonforfeitable after a period of service using three alternative methods. 29 U.S.C. Sec. 1053(a).

The definitions of "participant," "employer," and "employee" in ERISA fail to indicate any intention on the part of Congress to restrict the coverage of ERISA

to persons considered employees under common law agency principles. In Community For Creative Non-Violence v. Reid, 490 U.S. 730, the Copyright Act of 1976 provided that copyright ownership vests in the author, except in instances where the work is made "for hire" under which ownership vests in the employer. 17 U.S.C. Sec. 201(a), 201(b). Section 101 of the 1976 Act provides that a work is "for hire" if it is prepared "by an employee within the scope of his or her employment." 17 U.S.C. Sec. 101.

In contrast to ERISA, Congress did not define the term "employee" in the Copyright Act of 1976. This Court relied on the extensive legislature history of the Copyright Act as well as the language of the Act defining a "work for hire," 17. U.S.C. Sec. 101, in concluding that common

law agency principles should be utilized in determining whether a work was "for hire." In this case, there is no legislative history reflecting a compromise of conflicting views as in the case of the Copyright Act of 1976 nor are the relevant statutory definitions as restrictive. In addition, ERISA is the type of remedial social legislation in which this Court has looked to the purposes of the statute to determine the extent of coverage through the definition of the term "employee." United States v. Silk, 331 U.S. 704 (1947); Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947).

B. This Court has repeatedly taken a functional approach to ERISA.

In Massachusetts v. Morash, 490 U.S. 107 (1989), this Court held that an employer's policy of paying discharged employees for unused vacation time from the

general assets of the company did not constitute an employee welfare benefit plan under ERISA, 29 U.S.C. Sec. 1002(1). This Court in its opinion stated:

> Because ordinary vacation payments are typically fixed, due at known times, and do not depend on contingencies outside the employee's control, they present none of the risks that ERISA is intended to address. If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed - a danger Congress chose not to regulate in ERISA.

490 U.S. at 115.

In Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987), this Court held that an employee's state law claim for the improper processing of a disability claim under an insured employee benefit plan was pre-empted by ERISA. 29 U.S.C. Sec. 1144(a). The Court in its opinion noted that "[i]n expounding a statute, we

must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 481 U.S. at 52. In support of its holding, the Court cited the remarks of Sen. Javits that Congress intended that a body of substantive law would be developed by the courts to deal with issues arising under ERISA. 481 U.S. at 56.

In Firestone Fire & Rubber Co. v. Bruch, 489 U.S. 101 (1989), this Court held that the term "participant" under ERISA, 29 U.S.C. Sec. 1002(7), referred to employees "in or reasonably expect to be in, currently covered employment" or former employees who have "a reasonable expectation of returning to covered employment" or have "a colorable claim" to vested benefits. 489 U.S. at 117. The

Court supported its holding by stating that Congress' purpose in enacting the ERISA disclosure provisions would not be thwarted by the Court's reading of the term "participant." 489 U.S. at 118.

The holdings in the Morash, Dedeaux, and Bruch cases reflect a functional approach by this Court in interpreting the provisions of ERISA. In the Morash case, the Court looked to the purposes of ERISA in rejecting the argument that vacation pay was covered by ERISA. In the Bruch case, the Court affirmed its definition of "participants" in ERISA by determining that the proposed definition would, in fact, serve the purposes of the legislation. In Dedeaux, the Court renewed the longstanding admonition to look to the object and policy of the whole law in interpreting ERISA.

In an Opinion Letter issued in 1977, the Department of Labor stated that insurance agents whose business activity was predominantly with one life insurance company were employees under ERISA. Dep't of Labor, Op. Ltr. 77-75A, at 2 (Sept. 21, 1977). The Opinion Letter expressed the view of the Department of Labor that the term "employee" under ERISA should be interpreted to serve the protective purposes of the statute and not according to technical concepts. Subsequently in an Opinion Letter issued in 1991, the Department of Labor stated that defining the employment relationship under ERISA should rely on common law agency principles taking into account the remedial purposes of ERISA. Dep't of Labor, Op. Ltr. No. 91-17A at 3 (Apr. 5, 1991) (reprinted at Reply to Br. in Opp. App. 4a). Even though the

Opinion Letters appear to disagree in some respects, both letters do agree that the remedial purposes of ERISA should be considered in defining the term "employee."

C. Including Darden as an employee under ERISA best serves the purposes of the Statute.

The purposes of ERISA are far better served by utilizing a definition of "employee" based on those goals rather than the common law version which serves an entirely different purpose. The wisdom of using a definition functionally related to the goals of the statute can be demonstrated in Darden's case. Based on Nationwide's establishment of a comprehensive retirement plan for its agents, Darden had a reasonable expectation that he would ultimately receive benefits. (Pet. App. 16a-17a). In Massachusetts v. Morash, 490 U.S. 107, this Court found

that the danger of defeated expectations for vacation pay were no different than those for wages which Congress chose not to regulate under ERISA. In contrast, Darden had a reasonable expectation of receiving his retirement benefits which is clearly an expectation covered by ERISA.

Darden relied on his expectation by remaining an employee of Nationwide for eighteen years and foregoing other significant means of providing for his retirement. (JA-18a). Nationwide explicitly encouraged Darden and other agents to rely on the Agent's Security Compensation Plan as the foundation upon which to build a retirement plan. (Pet. App. 19a). Insurance agents who are independent agents and represent more than one insurance company can sell their business when they retire. (Pet. App. 18a;

JA-50). As a Nationwide Agent, Darden could not sell his agency when he retired since the policy expiration belonged to Nationwide. (Pet. App. 18a; JA-50). Without the benefit of disposing of his agency upon retirement, Darden was, in fact, dependent on the Nationwide retirement plan just as the company encouraged him to be.

Darden's reliance on the Nationwide retirement plan brings him squarely within the class of persons covered by the objectives and policies of ERISA. His reliance distinguishes him from independent agents who can rely on the sale of their agencies to provide retirement benefits to them and their families.

Darden and his fellow Nationwide agents lack sufficient bargaining power to bargain over the nonforfeitability of their

Nationwide retirement benefits. (Pet. App. 20a-23a). Persons who lack such bargaining power are the very persons whom Congress intended to protect through the vesting provisions of ERISA.

Nationwide was pleased that Darden continued in business representing other insurance companies following his termination by Nationwide. (JA-25-26). The covenant in Nationwide's Agent's Agreement was enforceable in the North Carolina state courts, see A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983), but Nationwide chose not to enforce it. Nationwide did not require the forfeiture of retirement benefits to obtain protection from competition by former agents. The detrimental effect on Darden and other agents of enforcing the forfeitability

provisions far outweighs any possible burden placed on Nationwide. This is particularly true in Darden's case where Nationwide was glad he went into competition with the company.

In Holt v. Winipisinger, 811 F.2d 1532, both parties agreed that common law principles of agency should apply when defining "Employee" under ERISA. In reversing the District Court's holding that the plaintiff was not an employee for the time at issue, the Court stated: "To allow employees to contract away ERISA's vesting provisions would frustrate the purpose of the statute, which was enacted to protect employees from just such unfair deprivations of pension benefits." 811 F.2d at 1541. The purpose of assuring the equitable character of retirement plans as set forth in ERISA, 29 U.S.C. Sec. 1001 is

not served by excluding Mr. Darden from coverage by ERISA.

The Fourth Circuit's test for determining whether Darden is an employee under ERISA is closely related to the purposes of ERISA. It also correlates in relevant respects to the common law agency principles as set forth in the Restatement (Second) of Agency Sec. 224 (1958)[2]. The

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[2] The Restatement (Second) of Agency Sec. 220, sets forth the following ten factors to consider in determining who is a servant:

Sec. 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which,

by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Court need not disregard entirely the factors in the common law agency test as set forth in the Restatement. The common law factors can be adapted to serve the purposes of ERISA especially in borderline cases such as this.

The first and most important factor is the extent of control. The Comment in the Restatement (Second) of Agency, Sec. 220, Subsection (2)(h) states that the master-servant relationship is indicated by an agreement for close supervision or de facto close supervision. This determination is related to the third part of the Fourth Circuit's test of whether Darden had sufficient bargaining power to control the terms of his agreement. As previously argued, the trial court found that Darden lacked such bargaining power and thus,

Nationwide had the requisite control under ERISA.

The common law agency test includes a determination of whether the employer or worker owns the place of work and tools of the trade. For purposes of vicarious liability, this test would be helpful in determining the dependence of the worker on the employer. This is equivalent in Darden's case to the ownership of his agency's policy expirations which were the most valuable asset of his insurance agency. The fact that Nationwide owned the expirations deprived Darden of a source of retirement benefits and was thus reflected in his reliance on Nationwide's retirement plan for his retirement.

The length of time the person is employed in the common law agency test is derived from the fact that usually

employees are employed for longer periods than independent contractors. The Fourth Circuit's test included length of service in order to weigh the strength of Darden's reliance on his expectation of actually receiving a retirement benefit.

The common law agency test includes a determination of whether the parties believe they are creating the relationship of master and servant. This tests the expectations of the parties. The Fourth Circuit considered as its first factor whether Nationwide took action that created a reasonable expectation on the part of Darden that benefits would be paid to him. This also tests the expectations of the parties, but in a manner directly related to ERISA's purposes.

Congress left to the courts the issues as to the parameters of coverage of ERISA

arising under the definition of employee. These issues should be addressed on a case-by-case basis with a federal common law gradually evolving under ERISA. Congress is free to intervene at any time to provide guidance through legislation.

The factors considered by the Fourth Circuit in determining that Darden was an employee of Nationwide are derived from the purposes of ERISA and should be utilized in all cases. Other factors related to the purposes of ERISA may be considered as well. In Darden's case, the factors relied on by the Fourth Circuit as well as other relevant factors show that Darden was an employee of Nationwide under ERISA and was within the class sought to be protected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 90-1802

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, and
NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ Of Certiorari
To The United States Court
Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDING

The statement provided pursuant to Rule 29.1 in Petitioner's Brief at page ii is currently accurate and requires no amendment.

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IN THE

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OCTOBER TERM, 1991

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NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. Darden Mischaracterizes the Test of Employee Status at Common Law and the Test Applied by the Court Below.

Respondent Robert T. Darden ("Darden") claims that the common law test (1) leads to the conclusion that he was Nationwide's employee (Respondent's Brief at 21-23) and (2) "correlates in relevant respects" with the test applied by the Fourth Circuit

in this case. (*Id.* at 40-43) Darden can make these claims only by mischaracterizing both tests.

Darden pretends that the common law test turns on whether a provider of services has enough bargaining power to assert "control over the terms of [his] agreemen[t]" with the hiring party. (Respondent's Brief at 23, 42) That is *not* the common law test. Instead of asking whether the service provider controlled the terms of the agreement, the common law asks whether the hiring party has the "right to *control the manner and means by which the [desired result] is accomplished.*" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (emphasis added).[1] *Cf.* Restatement (Second) of Agency § 220 cmt. e (1958) ("Those rendering service but retaining control over the manner of doing it are not servants.").

Darden attempts to find support in *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), but that decision only demonstrates the error of his position. As this Court observed, the collection agents in *United Insurance* "d[id] not have the independence, nor [were] they allowed the initiative and decision-making authority, normally associated with an independent contractor." *Id.* at 258. Because the agents worked primarily away from the company's office and set their own days and hours of work, the Court closely examined "the total factual context," a variety of

[1] Not surprisingly, Darden never addresses the application of the common law test by the district court, which found that he "was an independent contractor and not an employee" (Pet. App. 50a), or by the court of appeals, which agreed that he "probably would not qualify as an employee" (Pet. App. 39a) under the common law test.

circumstances suggesting that the insurance company closely supervised the manner in which the agents worked.[2] *See id.* at 258-59. The Court then observed (in the passage Darden quotes out of context) that the significance of those circumstances was best summed up by the fact that the agents were told to resign if they declined to follow a uniform plan dictated by the company for the handling of its business in every location. *Id.* at 259. (Darden, by contrast, had an express contract right to exercise independent judgment in running his agency (JA 8), and the district court found that he "was not required to incorporate the suggestions that [Nationwide] made." (Pet. App. 49a))

Darden correctly notes that ownership of the place of work and tools of the trade are relevant considerations under the common law test;[3] he compounds his earlier error, however, when he attempts to bend these considerations to work in his favor. Without pausing to note that he owned the building in which he and the employees he hired worked (Pet. App.

[2] The Court observed, *inter alia*, that the agents (whose "main job" was to collect premiums from policyholders) did not operate their own independent businesses, had no prior experience, were "trained by company supervisory personnel," did business "with considerable assistance and guidance" from the company's managers, and worked pursuant to a commission plan through which the company unilaterally promulgated and changed the terms and conditions under which they worked. *NLRB v. United Ins. Co.*, 390 U.S. 254, 259 (1968).

[3] As *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989) illustrates, a worker's ownership of the place and tools of work may make close supervision "practicably impossible" and thus supports a finding that the worker is an independent contractor under the common law. *Id.* at 752.

39a), Darden asserts that Nationwide "owned" his agency's policy expirations (Respondent's Brief at 43), as if Nationwide had an exclusive right to solicit future business from Darden's clientele when their policies came due for renewal or expiration. That assertion is false. Under the agreement between Darden and Nationwide, neither party held such an exclusive right: Nationwide retained the right to solicit its policyholders and thus to compete with Darden for their future business (JA 11, ¶ 10), just as Darden could (and did) compete with Nationwide for that business if he considered it more valuable than the compensation Nationwide agreed to pay if he refrained from so doing. (*See* JA 11-18, ¶ 11; JA 51)[4]

Finally, Darden characterizes the Fourth Circuit's test as focusing on "whether Nationwide . . . created a reasonable expectation . . . that benefits would be paid to [Darden]" and thus as protecting "expectations of the parties." (Respondent's Brief at 44) Far from protecting the parties' expectations, however, the Fourth Circuit *defeated* them. It expressly directed the district court to disregard the fact that "Darden's

[4] Darden's assertion that Nationwide could prevent him from competing by enforcing a restrictive covenant in state court (Respondent's Brief at 38) is false. By its terms, the restrictive covenant in Darden's agreement ceased to apply after his fifth year as a Nationwide agent (JA 18-19, ¶ 12), and Darden was a Nationwide agent for eighteen years. (*See* Pet. App. 33a) After the fifth year, the contract permitted Darden to solicit Nationwide policyholders but offered him compensation (including the Deferred Compensation Incentive Credits in issue here) if he refrained from doing so. (JA 17, ¶ 11) At trial, Darden expressly acknowledged that this compensation was offered as a "surrogate" for policy expirations and was of "rough[ly] equivalent . . . value." (Tr. 70)

expectations were limited . . . by the agency agreement's provision, present from the outset, that accrued benefits would be forfeited if Darden were to compete with Nationwide following the termination of his agency relationship." (Pet. App. 42a n.7) Without ever mentioning this aspect of the Fourth Circuit's analysis, Darden urges this Court to adopt a test of employee status based on expectations that could not reasonably exist.

2. Darden's Arguments Do Not Overcome the Fundamental Principle that Congressional Intent Governs Statutory Interpretation.

The Respondent's Brief nowhere asserts that Congress intended the term "employee" to have a broader meaning in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* (1988) ("ERISA") than the settled meaning of that term at common law. Instead, Darden infers from the absence of an express statutory reference to the common law standard (Respondent's Brief at 28-29) that "Congress left to the courts" the determination of ERISA's reach. (*Id.* at 44-45) This reasoning is directly contrary to the interpretive principle this Court unanimously reaffirmed in *Reid*: Courts must infer that Congress intended to incorporate the common law definition of "employee" *unless the statute dictates otherwise*. 490 U.S. at 739-40.

Darden does not even acknowledge, let alone respond to, this aspect of the Court's opinion. He does, however, attempt to distinguish *Reid* by noting that the statute in that case (1) did not define the term "employee," (2) had a legislative history "reflecting a compromise of conflicting views," and (3) did not involve what Darden calls (without defining) "reme-

dial social legislation." (Respondent's Brief at 29-30) None of these purported distinctions makes a difference.

How the circular definition of "employee" in ERISA as "any individual employed by an employer" is supposed to distinguish it from a statute with no definition is neither apparent nor explained in Darden's brief. It is clear, however, that on the inquiry *Reid* prescribes—whether Congress expressed an intent to depart from the common law meaning—the definition of "employee" in ERISA will not bear the weight Darden puts on it. Nor does the legislative history of ERISA reflect any intent to depart from the common law definition, as explained in Petitioner's Brief at 15, and as the lack of any reference to the legislative history of ERISA in Respondent's Brief confirms.

The final distinction Darden offers—the remedial purpose he sees in ERISA—rests on reasoning that Congress has twice repudiated. As Darden points out (Respondent's Brief at 26-27, 30), this Court concluded that the purposes of several New Deal statutes required a broader definition of "employee" than the one supplied by common law. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 120-21 (1944) (defining "employee" for purposes of National Labor Relations Act); *United States v. Silk*, 331 U.S. 704, 713-14 (1947) (defining "employee" for purposes of Social Security Act). Darden fails to acknowledge, however, that Congress responded to these decisions by amending the statutes to restore the common law definition it originally intended. (*See* Petitioner's Brief at 20-23) Viewed in the context of history, *Silk* and *Hearst* only confirm that the ordinary meaning of "employee" does not change simply because it appears in

a remedial statute and that Congress actually does intend to incorporate the common law definition if it does not specifically express a contrary intent.

The only other decision Darden relies upon, *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), is consistent with Congress' historical use of the common law meaning in statutes that do not dictate otherwise. In *Rutherford*, this Court applied the expansive definition of "employee" that it had previously interpreted the Fair Labor Standards Act as requiring, not merely because Congress sought to achieve a remedial social purpose, but because the Court determined that Congress gave the term "employ" a particularly broad definition in the statute and the legislative history reflected an intent to use "employee" more broadly than in any prior federal statute. 331 U.S. at 728; *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

Unable to deal with the decisions on which he relies in their historical context, Darden invites this Court to republish past decisions that Congress chose to alter. Indeed, although Darden does not acknowledge the Congressional reaction to *Silk* and *Hearst*, he ultimately advocates "case-by-case" judicial lawmaking, subject to Congressional repudiation, as the preferred method of expounding the meaning of "employee" in ERISA. (Respondent's Brief at 45) This Court's proper function is not to impose the burden of correction on Congress, but to interpret the statute already enacted. Darden's argument thus ignores not only the interpretive principle unanimously reaffirmed in *Reid*, but also the limited nature of judicial authority when the meaning of a federal statute is in issue.

3. Darden's Own Authorities Defeat His Argument that a "Functional Approach" to ERISA Requires Abandonment of the Settled Meaning of "Employee" at Common Law.

Darden argues that ERISA must be interpreted in the manner that best serves the purpose for which it was enacted (Respondent's Brief at 31-33, citing *Massachusetts v. Morash*, 490 U.S. 107 (1989), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)), and then claims (without further argument) that two opinion letters of the Department of Labor show that the common law definition of "employee" would frustrate that purpose. (Respondent's Brief at 34-35, citing Op. Ltrs. No. 77-75A (Sept. 21, 1977) and No. 91-17A (Apr. 5, 1991)) His argument reads too selectively, however, from the authorities that are supposed to support it.

Although this Court considered the purpose of ERISA in *Morash*, *Pilot Life*, and *Firestone*, those decisions do not suggest that purpose takes precedence over the settled meaning of the words of the statute. The Court did not look beyond the text of the pertinent provision in *Morash* until it determined that the text did not resolve the issue, 490 U.S. at 114-15, and even then the Court reasoned by analogy to other provisions of ERISA in order to determine the intent of Congress. *Id.* at 115-16. In *Pilot Life*, the Court gave effect to the "common-sense understanding" of the term it interpreted. 481 U.S. at 57.[5]

[5] That the Court also observed in *Pilot Life* that the text and history of closely related statutory provisions supported its interpretation does not suggest that "the object and policy of the whole law" (Respondent's Brief at 33) could have justified interpreting the statute contrary to the common-sense understanding of its terms. On the contrary, this Court has repeatedly observed that, where Congress' intent can be determined through natural reading of ERISA's terms or history, policy arguments should be directed to Congress and not to this Court. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981).

Darden, by contrast, urges departure from the common sense distinction between employees and independent contractors that is captured by the common law test. (*See* Petitioner's Brief at 25)

Firestone affirmatively refutes Darden's claim. Seizing upon language in a section of the opinion on an issue not addressed by the statute, Darden fails to note that the Court also reversed an interpretation of the term "participant" because the court of appeals "stray[ed] far from the [pertinent] statutory language." 489 U.S. at 117. Instead of engaging in the policy analysis Darden advocates, the Court interpreted ERISA according to the "natural" and "conventional" meaning of the words used by Congress, *id.* at 117-18, and then rejected the argument that doing so would thwart the purpose of the statute, *id.* at 118.

The two opinion letters of the Department of Labor that Darden relies on lend no more support to his arguments than the decisions of this Court discussed above. Neither of the letters adopted the novel test of employment status Darden advocates. In fact, the most recent letter applies the common law test, and the earlier one states an interpretation of ERISA that the United States no longer defends.

The 1977 letter states that "the term 'employee' . . . should be interpreted not according to technical concepts derived from the common law of agency, but in the light of the protective purposes of ERISA," Op. Ltr. No. 77-75A at 1, and then suggests that *any* worker who participates in an employee benefit plan with "potential for abuse" would be deemed an "employee" under ERISA. *Id.* at 2. In addition, the letter observes that the Federal Insurance Contributions Act, 26 U.S.C. § 3121 *et seq.* (1988) ("FICA") specifically includes full-time life insurance salesmen in its definition of "employee,"[6] and states that the Department of Labor intended to interpret the term at least as broadly in ERISA as it had been used there. *Id.* at 2.

The United States concedes that this aspect of the 1977 opinion letter is incompatible with *Reid* (Brief of United States as *Amicus Curiae* at 18 n.13), and in any event, the Department of Labor no longer interprets ERISA as it did in that letter. The Labor Department's most recent pronouncement, Opinion Letter 91-17A, expressly embraces the common law test, stating that the existence of an employer-employee relationship "will be determined by applying

[6] FICA defines "employee" as "any individual who, under the usual common law rules . . . has the status of an employee," 26 U.S.C. § 3121(d)(2), plus several specifically identified classes of workers who are deemed to be employees regardless of their common law status. *Id.* § 3121(d)(1), (d)(3). Full-time life insurance salesmen are deemed to be employees regardless of their status under the common law rule, *id.* § 3121(d)(3)(B); other insurance salesmen, like Darden, are employees under FICA only if they satisfy the common law test. *See* 26 C.F.R. § 31.3121(d)-1(d)(3)(ii) (1991).

common law principles, taking into account the remedial purposes of ERISA." *Id.* at 2-3.[7]

4. Darden's Claim that the Common Law Test Is Suitable Only for Issues of Vicarious Liability Conflicts with Use of the Test to Protect "Employees" under Numerous Federal Statutes and the Common Law.

Darden argues at length that the common law test was developed only for determining when principals should compensate damages caused by their agents, and that it is ill suited for determining which service providers can legitimately claim benefits from the companies that engage them. (Respondent's Brief at 11-21) Those arguments are without foundation.

At common law, the definition of "servant" not only determines when principals are liable for torts committed by their agents, but also describes the class of agents to whom principals owe the duties of an employer toward an employee. *Restatement (Second) of Agency* § 2 cmt. a (1958). *See also* § 472 cmt. b; §§ 473-528 (1958). More importantly, whatever the origin of the common law definition may be, Congress has repeatedly used it to identify the class of workers protected by federal statutes governing the relationship between employers and employees. *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323-24 (1974) (Federal Employers' Liability Act); *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 186 (1970) (Social Security Act); *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968) (National Labor Relations Act). Darden offers

[7] Reference to "the remedial purposes of ERISA" is superfluous, since the common law test supplies an appropriate definition of "employee" without any modification. *See infra* at 12-13.

no explanation why Congress would consider the common law definition appropriate for those statutes but not for ERISA.

While Congressional intent alone is dispositive, the brief submitted by the United States demonstrates that the common law test is compatible with the purpose of ERISA and requires no modification. As the United States explains, the health plan participants in the most recent opinion letter of the Department of Labor "were employees of the clients because they were subject to the control of the clients," (Brief of United States at 9, discussing Op. Ltr. No. 91-17A), and the Department of Labor, exercising sensitivity to ERISA's purpose, "saw no reason to depart from" the conclusion dictated by the common law. (Brief of United States at 17) Exercising the same sensitivity, the United States also approves of *Professional & Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225, 231-35 (1987), *aff'd*, 862 F.2d 751 (9th Cir. 1988), in which "the IRS successfully argued that professionals could not evade ERISA's minimum participation requirements . . . since under common law principles they were not employees of the leasing company . . . ." (Brief of United States at 9-10) No suggestion is made that consideration of ERISA's remedial purpose was necessary to, or even a part of, the reasoning that led either the IRS or the Tax Court to this conclusion, or that consideration of ERISA's remedial purpose was necessary for any court to reach an appropriate result in any other case.

On the contrary, the United States appears to approve (as it should) of the result in every case in which the common law test was correctly applied, and does not identify any circumstances under which ap-

plication of the common law test would frustrate ERISA's purpose.[8] In fact, it does not appear that the sensitivity to ERISA's purpose advocated by the United States would actually modify the common law test in any respect. The United States approves of the district court's approach in this case, because the court "assessed [the common law] factors in light of the 'total factual context.' " (Brief of United States at 24, quoting Pet. App. 50a) This is no modification of the common law test; it *is* the common law test as conventionally understood. *See NLRB v. United Ins. Co.*, 390 U.S. at 258 ("the total factual context is assessed in light of the pertinent common-law agency principles").

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[8] At pages 19-21, the United States' brief discusses *Wolcott v. Nationwide Mut. Ins. Co.*, 884 F.2d 245, 250 (6th Cir. 1989), *Holt v. Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987), *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam), *cert. denied*, ___ U.S. ___, 111 S. Ct. 370 (1990), *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 347 (1990), and *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1102 n.6 (5th Cir. 1990). It criticizes the result in *Penn* alone, noting, however, that "[t]he decision was probably erroneous under the common law test." (Brief of United States at 21 n.21) The United States observes that the other opinions do not "expressly restric[t]" their analysis to "whether the 'employer' had the right to control the 'employee' such that it would be proper to hold the 'employer' vicariously liable for torts committed by the 'employee'." (Brief of United States at 21 n.20) The opinions in *Wolcott*, *Holt*, *Plazzo* and *Mayeske* do, however, expressly apply the common law test without any hint that manipulation was necessary to reach the results that the United States apparently considers appropriate.

5. The Test Darden Advocates Would Make Determinations of Employee Status Less Predictable, Not More.

While the United States' brief shows that modification of the common law test is unnecessary, Darden's brief shows that it would be counter-productive. He claims that the common law test is unpredictable, but fails to note that his own authority attributes unpredictability to the very sort of result-oriented manipulation Darden now proposes:

> The explanation . . . seems to lie partly in the relative weight given to the various tests of status and partly in the extent to which courts define status in view of the purpose served by the particular legislation . . . .

(Respondent's Brief at 20, quoting A. Larson, *The Law of Workmen's Compensation* § 43.10 (1991))

Darden's attempt to shore up his claim by noting the reversal of district court decisions in *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987), and *Plazzo v. Nationwide Mut. Ins. Co.*, No. 88-4016 slip op. (6th Cir. Dec. 22, 1989) (per curiam), *cert. denied*, ___ U.S. ___, 111 S. Ct. 370 (1990) (unpublished opinion reprinted at Pet. App. 54a-58a), falters under the weight of exaggeration. Contrary to Darden's description, the reversal in *Holt* does not reflect disagreement on what result the common law test dictated; the district court acknowledged applicability of the common law test, but failed to elaborate and apply it. *Holt*, 811 F.2d at 1538-39. In *Plazzo*, the Sixth Circuit simply noted that the case was indistinguishable from another one decided by the court of appeals *after* the district court in *Plazzo* ruled. (Pet. App. 57a-58a) That a district court made a mistake before the court of appeals

issued its first instruction on employee status under ERISA hardly shows that the common law test is unpredictable in the Sixth Circuit (or anywhere else) now.

There are, of course, close cases with complex facts in which reasonable jurors or jurists could differ, but that degree of uncertainty is unavoidable when factual questions are involved, and it pales in comparison with the unpredictability of the test Darden advocates. In his view, " 'any individual' whose services are engaged" is or may become an employee. (*See* Respondent's Brief at 24) Because Darden's test narrows that class by focusing on investment decisions made by individual workers over the duration of their careers, it permits the employment status of individual workers to vary over time. His test would therefore make it difficult, if not impossible, for an employer to identify its employees prior to their retirement. That sort of unpredictability could prevent compliance with ERISA's funding, reporting, and disclosure requirements and is therefore clearly intolerable. Thus, Darden's arguments not only ignore Congressional intent embodied in the words of the statute, but also fail on their own terms to provide any policy justification for departure from the common law test.

CONCLUSION

For the foregoing reasons and those set forth in the Petitioner's Brief, the judgment of the court of appeals should be reversed and the case remanded with instructions to enter judgment for Nationwide.

Respectfully submitted,

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No. 90-1802

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
and NATIONWIDE LIFE INSURANCE COMPANY,
Petitioners,

v.

ROBERT T. DARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Association of Independent Insurers ("NAII") respectfully moves this Court for leave to file the accompanying brief in support of Petitioners in this case as *amicus curiae*. The NAII has requested the written consent of each party to the filing of the accompanying brief. Such written consents were not provided.

1. NAII is one of the largest associations of property and casualty insurers in the United States. The NAII is presently composed of approximately 550 member companies which provide property and casualty insurance in the national market. These companies write $54.6 billion in premiums representing 25 percent of all property and casualty insurance written in the United States. They employ all types of marketing systems: telemarketing, direct writers, captive agents, and independent agents.

2. a. This case addresses the definition of the term "employee" contained in § 3(6) of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6) (1988). Specifically, this case concerns whether the term employee, for purposes of ERISA, includes within its scope captive independent-contractor insurance agents and other individuals who work in a relationship that, by traditional common-law tests, would be characterized as independent contractors. Additionally, this case, by implication, concerns the question of whether certain individuals, who under traditional standards would be characterized as employees, for purposes of ERISA would not be employees.

b. The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987); *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989).

c. The Fourth Circuit's test consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining power element. By virtue of this test's overall disregard of factors associated with the work relationship, and emphasis on factors exogenous to such relationship, some individuals who under the traditional common-law test are employees would not be entitled to ERISA protection. Obversely, many who under the common-law test are *not* employees would be covered under ERISA. The practical consequence of the Fourth Circuit's definition is to substitute for the class of persons Congress intended to be covered by ERISA a class of the Fourth Circuit's own creation.

d. The Fourth Circuit's test is wholly irreconcilable with the decision of this Court that the Fourth Circuit cites in support of its test. *See, United States v. Silk*, 331 U.S. 704 (1947). Whereas in *Silk* this Court crafted a definition of the term employee that closely resembles the common-law test, the definition devised by the Fourth Circuit is radically different. Such test is a product of the Fourth Circuit 1) misapplying the clearly-enunciated rules set forth by this Court in *Silk*, and 2) misconstruing the purpose Congress sought to achieve in enacting ERISA. In addition, the Fourth Circuit's test is inherently unworkable.

e. By this Court restoring the traditional common-law definition of employee for purposes of ERISA, the correct meaning would be given to the term Congress used to describe the class of persons to be included within the ambit of ERISA. Moreover, doing so would restore consistency between the definition of that term and the legislative history accompanying the enactment of ERISA, which states that the term "employee" was intended to have the same meaning as it does in collective bargaining agreements. H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973). Additionally, adoption of the common-law test would reaffirm this Court's reasoning in *Silk*.

3. Inasmuch as NAII-member companies rely almost exclusively on agents of one of the types noted in paragraph 1, *supra*, to market their products, and in some cases maintain a compensation arrangement with such

agents that provides for some element of compensation to be paid the agent in a year subsequent to the particular year in which the insurer's product is sold, the Court's decision in this case will have a substantial impact on NAII members. Consequently, the NAII has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that the National Association of Independent Insurers' motion for leave to file the accompanying brief *amicus curiae* in support of the Petitioners in this case be granted.

Respectfully submitted,

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IN THE

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v.

ROBERT T. DARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Association of Independent Insurers ("NAII") respectfully submits this brief in support of Petitioners in this case as *amicus curiae*. NAII is one of the largest associations of property and casualty insurers in the United States. The NAII is presently composed of approximately 550 member companies which provide property and casualty insurance in the national market. These companies write $54.6 billion in premiums representing 25 percent of all property and casualty insurance written in the United States. They employ all types of

marketing systems: telemarketing, direct writers, captive agents, and independent agents.

SUMMARY OF ARGUMENT

This case addresses the definition of the term "employee" contained in § 3(6) of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA" or the "Act"), 29 U.S.C. § 1002(6) (1988). Specifically, this case concerns whether the term employee, for purposes of ERISA, includes within its scope captive independent contractor insurance agents and other individuals who work in a relationship that, by traditional common-law tests, would be characterized as independent contractors. Additionally, this case, by implication, concerns the question of whether certain individuals, who by traditional standards would be characterized as employees, for purposes of ERISA would not be employees.

The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981), *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987); *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989).

The Fourth Circuit's test consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining power element. By virtue of this test's overall disregard of factors associated with the work relationship, and emphasis on factors exogenous to such relationship, some individuals who under the traditional common-law test are employees would not be covered by ERISA. Obversely, many who under the common-law test are not employees would be covered by ERISA. The practical consequence of the Fourth Circuit's definition is to substitute for the class of persons Congress intended to be covered by ERISA a class of the Fourth Circuit's own creation.

The Fourth Circuit's test is wholly irreconcilable with the decision of this Court that the Fourth Circuit cites as support for its test. *See, United States v. Silk*, 331 U.S. 704 (1947). Whereas in *Silk* this Court crafted a definition of the term employee that closely resembles the common-law test, the definition devised by the Fourth Circuit is radically different. Such test is a product of the Fourth Circuit 1) misapplying the clearly-enunciated rules set forth by this Court in *Silk*, and 2) misconstruing the meaning and the purpose Congress sought to achieve in enacting ERISA. In addition, the Fourth Circuit's test is inherently unworkable.

By this Court restoring the traditional common-law definition of employee for purposes of ERISA, the correct meaning would be given to the term Congress used to describe the class of persons to be included within the ambit of ERISA. Moreover, doing so would restore consistency between the definition of that term and the legislative history accompanying the enactment of ERISA, which states that the term employee was intended to have the same meaning as it has in collective bargaining agreements. H. Rep. No. 533, 93d Cong., 1st Sess. 10 (1973). Additionally, adoption of the common-law test would reaffirm this Court's reasoning in *Silk*.

Inasmuch as NAII-member companies rely almost exclusively on agents of one of the types noted above to market their products, and in some cases maintain a compensation arrangement with such agents that provides for some element of compensation to be paid the agent in a year subsequent to the particular year in which the insurer's product is sold, the Court's decision in this case will have substantial impact on the NAII membership.

Consequently, NAII has a special and direct interest in the outcome of this case. NAII respectfully submits that, in light of the historically-recognized meaning of the term employee, and the interpretation of that term which this Court has adopted in its prior decisions, the traditional common-law test should be adopted for defining employee for purposes of ERISA.

ARGUMENT

I

The term employee is a cornerstone of the ERISA statute, inasmuch as that term establishes an individual's eligibility to the protections of that statute, and right to institute an action seeking recovery of benefits under a plan covered by ERISA if such benefits are denied. Under ERISA § 502(a), 29 U.S.C. § 1132(a), an action for recovery can be maintained only by a participant (or a beneficiary). Moreover, an individual must first be an employee before being eligible to become a participant. ERISA § 3(7), 29 U.S.C. § 1002(7). Thus, in order to bring an action to recover benefits due under an ERISA plan, an individual (other than a beneficiary) must either be, or have been, an employee.

Under the traditional common-law definition, an individual is an employee if the service recipient has the right to control and direct the individual as to both the result to be accomplished and the details and means by which the result is to be accomplished. *E.g., New Orleans M. & C. Railroad Co. v. Hanning*, 15 Wall. 649, 656 (1872); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889). The determination of whether an individual is an employee under the common-law test is generally based on an analysis of several key factors.[1]

[1] E.g., Restatement (Second) of Agency § 220(2) (1958) sets forth the following ten factors: (1) the extent of control which, by the agreement, the master may exercise over the details of the work; (2) whether or not the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the person is employed; (7) the method of payment, whether by the time or by the job; (8) whether or not the work is a part of the regular business of the employer; (9) whether or not the parties believe they are creating the relation of master and servant; and (10) whether the principal is or is not in business. Similarly, the Internal Revenue Service has devised a twenty-factor test for determining employee status under the common-law. Under such test, factors indicative of employee status include whether individuals: (1) must comply with employer's instructions about the work; (2) receive training from or at the direction of the employer; (3) provide services that are integrated into the business; (4) provide services that must be rendered personally; (5) hire, supervise, and pay assistants for the employer; (6) have a continuing working relationship with the employer; (7) must follow set hours of work; (8) work full-time for an employer; (9) do their work on the employer's premises; (10) must do their work in a sequence set by the employer; (11) must submit regular reports to the employer; (12) receive payments of regular amounts at set intervals; (13) receive payments for business and/or travel expenses; (14) rely on the employer to furnish tools and materials; (15) lack a major investment in facilities used to perform the service; (16) cannot make a profit or suffer a loss from their services; (17) work for one employer at a time; (18) do not offer their services to the general public; (19) can be fired by the employer; and (20) may quit work at any time without incurring liability. I.R. Manual, Ch. 4600 Employment Tax Procedures, Ex. 4640-1.

The Fourth Circuit's test for employee status under ERISA is dramatically different from the common-law test, which has been adopted by all other federal appellate courts that have addressed the issue. *Cf. Penn v. Howe-Baker Engineers, Inc.*, 899 F.2d 1096 (5th Cir. 1990); *Wardle v. Central States Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Holt v. Winpisinger*, 811 F.2d 1532

(D.C. Cir. 1987). Where a test similar to that adopted by the Fourth Circuit was adopted at the district court level within the Sixth Circuit, such test was rejected by the Sixth Circuit Court of Appeals. *Wolcott v. Nationwide*, 884 F.2d 245 (6th Cir. 1989). *aff'g in part and rev'g in part*, 664 F.Supp. 1533 (S.D. Ohio 1987).

The novel and unorthodox test for determining employee status developed by the Fourth Circuit consists of three conjunctive elements: an expectation element, a reliance element, and a bargaining-power element. As is evident, the Fourth Circuit's test departs significantly from the common-law test.

The Fourth Circuit's test would provide ERISA coverage to some common-law independent contractors, while denying ERISA coverage to some common-law employees. This anomalous result is attributable to the Fourth Circuit test's diminished regard for factors associated with the work relationship, while emphasizing factors outside of such relationship.

The Fourth Circuit's test, briefly stated, requires that:

1. the sponsor of the "pension plan" has taken some action that created a reasonable expectation on the individual's part that benefits would be paid in the future;

2. the individual manifests reliance on that expectation by a) remaining for "long years" in the "employer's" service, *and* b) foregoing other significant means of providing for his or her retirement; and

3. the individual lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits.

Darden v. Nationwide Mutual Insurance Company, 796 F.2d 701, 706 (1986). The Fourth Circuit's test reflects

the contract-law concept of promissory estoppel.[2] *See generally* 17A Am Jur 2d. Contracts § 120. The relevance of that contract-law concept to the definition of employee for purposes of ERISA is remote at best. It is respectfully submitted that the transmutation of the term employee into a contract-law promissory estoppel test is supportable only if the statute subject to interpretation contains express language to support such interpretation. No such language is apparent in ERISA.

II

The Fourth Circuit's test is seemingly derived from its interpretation of this Court's decision in *United States v. Silk*, 331 U.S. 704 (1947). Although the Fourth Circuit also cited *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) as authority for such test, it is submitted that, as this Court observed in *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968), the Congress repudiated that decision by enacting an amendment that expressly excludes from the definition of employee anyone having the status of independent contractor. The Court stated in *United Insur. Co. of America* that the "obvious purpose of [the aforementioned] amendment was to have . . . general agency principles [apply] in distinguishing between employees and independent contractors." 390 U.S. at 256. Hence, the Fourth Circuit's reliance on the *Hearst Publications* decision for guidance in interpreting the term employee for ERISA purposes is highly questionable.

The portion of the *Silk* decision that the Fourth Circuit found dispositive of how the term employee should be interpreted for purposes of ERISA is:

> [t]he word "employee" . . . [in the context of a particular federal statute is] to be construed "in the

[2] Within the context of contract law, the doctrine of promissory estoppel provides that a promise becomes binding if the promisee suffers detriment in reliance on such promise, notwithstanding that such detriment was not requested by the promisor as consideration.

> light of the mischief to be corrected and the end to be attained."

331 U.S. at 713, citing *NLRB v. Hearst Publications*, 322 U.S. 111. The Fourth Circuit's application of the foregoing rule, the so-called "economic reality test," in crafting its definition of employee under ERISA was improper for two reasons. First, the Fourth Circuit applied the economic reality test concept in an extreme and exaggerated manner, completely ignoring the countervailing qualifications reiterated by this Court in *Silk* several times. Second, the Fourth Circuit's definition of employee would subvert the very stated intent that it relied on to support its definition.

A. Fourth Circuit's Test Is Irreconcilable With *Silk*

The countervailing considerations that this Court admonished in *Silk* should be taken into account—in addition to the above quoted passage—are:

> [of] course, this does not mean that all who render service to an industry are employees . . . . Obviously . . . [t]he distributor who undertakes to market at his own risk the product of another, or the producer who agrees so to manufacture for another, ordinarily cannot be said to have the employer-employee relationship.

331 U.S. at 712 (citations omitted). Indeed, the foregoing passage indicates that "obviously" a distributor—such as an insurance agent—who undertakes to market at his own risk the product of another—such as the insurance product of another—cannot be said to have the employee-employer relationship. This Court also stated:

> of course, [permitting courts to take into account legislative intent in defining "employee"] does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the

> man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution.

331 U.S. at 714. The foregoing passage illustrates this Court's acknowledgement that while the common-law definition of "employee" can be contoured to effectuate the end sought to be achieved by a particular statute, the basic common-law test approach cannot be abandoned, unless Congress has manifested an intent to "change normal business relations." It is respectfully submitted that such a manifestation does not exist in ERISA. Finally, the Court in *Silk*, assured that:

> [c]ertainly the industry's right to control how "work shall be done" is a factor in the determination of whether the worker is an employee or independent contractor.

331 U.S. at 714. Inasmuch as control is the hallmark of the common-law test, by this passage the Court is simply reiterating the continued applicability of the common-law test—albeit to be applied in the context of the statute's remedial purpose.

The foregoing passages, while set forth in *Silk*, were omitted from the Fourth Circuit's opinion. Clearly, these statements in *Silk* reveal this Court's intent that the underlying purpose of a statute being interpreted is to be taken into account in defining "employee," only to the extent that such can be done without departing from the basic, historically-recognized, common-law underpinnings of employee status. The Fourth Circuit's definition of an employee fails to adhere to the teachings of *Silk* by ignoring these countervailing considerations.

The Fourth Circuit's erroneous application of the *Silk* rule of interpretation is most apparent by the fact that in *Silk* the Court's definition of "employee" is, in sub-

stance, an application of the common-law test,[3] whereas the Fourth Circuit's test represents a complete abandonment of the common-law test. In *Silk*, this Court ruled that examples of factors that should be considered to "define the limits of the employer-employee relationship" include: degree of control, opportunities for profit or loss, investment in facilities, permanency of relationship and skill required. 331 U.S. at 716. A comparison of the factors enumerated in *Silk* with the examples of common-law factors set forth *supra* at note 1, reveals that each and every one of the *Silk* factors is a common-law factor. Moreover, the fact that this Court stated in *Silk* that the factors it enumerated do not constitute a complete list, *id.*, together with the countervailing considerations it set forth that are discussed above, make it self-evident that in *Silk* this Court adopted in substance the common-law test. Indeed, *Silk*'s progeny has reaffirmed this interpretation. *E.g., Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216 (Ct. Cl. 1965).

In contrast, none of the three elements of the Fourth Circuit's test can be found among the common-law factors. *Cf. supra* note 1. In this regard, a comparison of *Silk* with *Hearst Publications* reveals that *Silk*, which remains valid, while giving deference to the statute's purpose, acknowledged that the traditional concept of employee status could not be ignored. In *Hearst Publications*, which was effectively repudiated by Congressional action, the Court took the position that "the ends sought to be accomplished by the legislation . . . *may outweigh* technical legal classification," 322 U.S. at 128 (emphasis added), thereby enabling statutory purpose to swallow up and nullify any terms of the statute whose effect would be to so limit the scope of a statute's pur-

[3] In *Illinois Tri-Seal Products, Inc. v. United States*, 353 F.2d 216, 225 (Ct. Cl. 1965), this Court's decision in *Silk* was viewed by the Court of Claims as "obviously consistent with established common-law principles of control."

view as to arguably conflict with the statute's purposes.[4] It is submitted that the Fourth Circuit's test follows, or perhaps goes even farther afield than, the approach taken in *Hearst Publications*. Such test is clearly in conflict with the teachings of *Silk*. The distinction between these two analytical approaches to defining employee status was perhaps best stated by the Court of Claims, after an exhaustive analysis of *Silk*, its history and its progeny:

> [t]he conclusion to be drawn from the foregoing is that the existence or absence of an employment relationship is to be ascertained not by use of the economic reality test but by applying the common-law rules realistically.

353 F.2d at 228. In other words, in defining employee for purposes of a particular statute, statutory purpose should not itself define employe, but rather should provide the context that influences, not overrides, the application of the common-law rules.

As Congress demonstrated by its repudiation of the *Hearst Publications* decision, if Congress intends for a statute to apply to any individual who might arguably be in a position to benefit from the broad purpose espoused by such statute, the statute would not contain terms with historically-recognized meaning to define the class of individuals to be covered by the legislation. Since ERISA clearly limits the class of individuals who are

[4] Although the *Silk* decision cites *Hearst Publications* for the proposition that statutory terms, such as "employee," should be interpreted in a manner that effectuates statutory purpose, the decisions in each of those cases evidence the economic realities test concept being applied with different vigor. *Silk* represents a much more restrained application of that concept than *Hearst Publications*. It is submitted that the disparate degrees of restraint that was exercised by the Court in applying the economic realties test concept in each case is the critical distinguishing feature of those decisions, and perhaps explains why Congress repudiated *Hearst Publications*, but permitted *Silk* to remain efficacious.

eligible to maintain an action seeking benefits under an ERISA plan, ERISA § 502(a), 29 U.S.C. 1132(a), individuals outside of that class should not be deemed eligible to maintain such an action, unless a specific exception can be found within the statute that would permit eligibility to be bestowed upon such individuals.

B. Fourth Circuit's Test Misconstrues Purpose of ERISA

A further fatal flaw in the Fourth Circuit's reasoning involves its interpretation of what Congress sought to achieve in enacting ERISA. The specific language of ERISA, relating to its purpose, that was cited by the Fourth Circuit as the basis for its definition of employee is:

> Congress was concerned that "many *employees* with long years of *employment* are losing anticipated retirement benefits." Because *employee* benefit plans "have become an important factor affecting the stability of *employment* and the successful development of industrial relations," Congress felt that it was desirable in the interests of the free flow of commerce, as well as in the interests of individual *employees* and their beneficiaries, to enact minimum standards "assuring the equitable character of such plans and their financial soundness."

796 F.2d 706 (quoting in part ERISA § 2, 29 U.S.C. § 1001) (emphasis added). The use of the term "employee," or a derivative thereof, in the foregoing passage serves to describe the class of persons entitled to protection under the Act.

The Fourth Circuit's definition of employee, however, gives absolutely no deference to that class description, but rather substitutes one of its own. The quoted language sets forth the express concerns that Congress sought to redress by enacting ERISA, which were that "many employees . . . are losing anticipated retirement benefits."

The Fourth Circuit interpreted that sentence as describing a protected class consisting of any individual who:

1. anticipates receiving retirement benefits;
2. relies on the expectation of receiving such retirement benefits; and
3. lacked sufficient bargaining power to obtain nonforfeitable contract rights to the retirement benefits.

796 F.2d at 706-707. The Fourth Circuit's attempt to define ERISA's protected class by "taking into account" ERISA's broad policy objective nowhere acknowledges the class that Congress identified in ERISA's purpose clause, ERISA § 2, 29 U.S.C. § 1001, and described in the statute as the only individuals (other than beneficiaries) who are eligible to maintain an action under ERISA seeking recovery of benefits owed under an ERISA plan, ERISA § 502(a), 29 U.S.C. §§ 1132(a). Instead, these three elements reflect only statutory purposes. This approach violates the teachings of *Silk*, that statutory purpose should not do more than influence the application of common-law rules for defining employee status. In light of the response of Congress to a similar approach taken in *Hearst Publications*, where statutory purpose was elevated over the common-law rules, it is respectfully submitted that this Court repudiate the Fourth Circuit's definition of employee.

III

Fourth Circuit's Test Is Unworkable

In addition to the conceptual deficiencies of the Fourth Circuit's test, such test also is patently unworkable. From a practical standpoint, in an action brought by an individual seeking benefits due under a plan covered by ERISA, the first element of the Fourth Circuit test will almost always be satisfied by common-law employees and

independent contractors, alike. Similarly, in such cases, the third element would not be satisfied only on rare occasions. It is the second element that generally would be dispositive of a worker's status.

The first element of the Fourth Circuit's test requires in substance only that the participants harbor some expectation that what is promised will be delivered. Likewise, with respect to the third element, it is respectfully submitted that situations where the bargaining strength of a particular individual is on par with or greater than that of the collective business are extremely rare. Moreover, it is submitted that individuals who possess this much bargaining power would likely also not satisfy the second element.

The second element generally would be dispositive of an individual's status. Such element, it is submitted, constitutes bad policy, is conceptually deficient and is unworkable. The second requirement of the second element is where the principal problem lies. It requires the demonstration of the existence or absence of other significant means of providing for retirement.

From a policy standpoint, it is submitted that such a requirement is inadvisable, inasmuch as it rewards irresponsibility, and punishes prudent retirement planning or the acquisition of substantial assets from means other than an individual's business. In addition, it penalizes younger or single individuals who empirically are less likely to focus on retirement needs.

The primary conceptual deficiency of this requirement is that it permits an individual's status to turn on a factor over which the individual has total control—thereby eliminating the interest and concerns of the service-recipient from the relationship.

While the instant case involves an individual seeking employee status under ERISA, this Court should be mindful of the other instances where an individual's best

interest would be served by remaining outside the ambit of ERISA. A stark illustration of the latter would be an individual who seeks the application of state-law remedies, such as punitive damages, incident to a claim being brought with respect to a plan. Such state-law remedies generally are not available if the particular matter is within the scope of ERISA. *See, Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). Thus, the definition of employee for purposes of ERISA is inherently susceptible to abuse, by virtue of there being some instances where employee status for purposes of ERISA would be desirable, and others where such status would be undesirable.

Defining employee status in a way that provides the individual unilateral control over a key factor of the definition is not supportable. Congress nowhere indicates such an intent in the ERISA statute. It is submitted that to provide an individual almost total unilateral control over his status in effect encourages that individual to arrange his or her affairs to either obtain or avoid ERISA protection, whichever appears more advantageous to the person at a particular time. Such flexibility would not be limited to common-law independent contractors; it would also extend to common-law employees. Indeed, the second element of the Fourth Circuit's test could result in two individuals with identical work relationships, that is, with one business and the rendering of identical services, being treated differently under ERISA, solely on the basis of differing approaches to their individual retirement planning.

The fact that the Fourth Circuit's test is not workable is apparent from the lengthy dispute in which the instant parties became ensnarled during the appeal. The issue was whether Darden owned sufficient assets, other than the Nationwide deferred compensation plan, of a "retirement" character, as to demonstrate his lack of reliance on the company's deferred compensation plan to provide for

his retirement security. Defendants-Appellants' opening appellate court brief (filed November 13, 1989) at 32-38; Plaintiff-Appellee's opening appellate Court brief (filed December 15, 1989) at 10-24. The Fourth Circuit test would demand that service recipients, and courts ascertain 1) the character, that is, retirement or non-retirement, of each asset that an individual possesses at a particular time, and, 2) of those assets determined to be of "retirement character," the individual's motivation for acquiring *each and every* one of those assets. Such determinations, it is submitted, approach the metaphysical.

A further unworkable aspect of the Fourth Circuit's test is that in order for a plan sponsor to determine the status of plan participants, the sponsor would need to collect and analyze information concerning the retirement arrangements established by each and every person participating in the plan. Moreover, since an individual's financial planning should, and frequently does, change over time, a plan sponsor would need to undertake such studies on a continuing basis.

IV

It is respectfully submitted that for purposes of ERISA, an employee should be defined under the common-law test. Defining the term employee in ERISA according to the common-law definition eliminates several inconsistencies, and brings harmony to the employee-independent contractor distinction as recognized virtually universally in the statutory and the common law. More importantly, however, adopting the common-law definition would restore to the term employee its historically-recognized definition, and would comport with the Congressional intent manifested by the legislative history accompaning the enactment of ERISA.

As noted, ERISA defines "employee" as "any individual employed by an employer." ERISA § 3(6), 29 U.S.C. 1002(6). Implicit in this statutory definition is a work relationship—not a contract-law concept. Thus, a departure from the common-law definition is justifiable only by demonstrating a statutory basis for doing so. Indeed, according to a recognized treatise on statutory construction:

> [t]o ignore a definition section is to refuse to give legal effect to a part of the statutory law. . . . To hold that the "words of the act" [that is, statutory purpose] control the definition section is to declare that the legislative intent is exactly the opposite of that declared by the legislature. . . . The legislature is the primary law-making authority and should be able to declare the law in any form it chooses as long as it is clearly expressed.

Sutherland Stat. Const. § 27.02 (4th Ed. 1989). Hence, the conventional principles of statutory construction would support an interpretation of the term employee that was consonant with its true meaning, that is, a description of a particular type of work relationship. To interpret the term employee as a contract-law promissory estoppel-type requirement, as the Fourth Circuit did, would, it is submitted, clearly violate this principle of statutory construction.

A common-law definition of employee would comport with the legislative history of ERISA, which provides:

> the definition "employee" is intended to encompass any person who has the status of an "employee" under a collective bargaining agreement.

H. Rep. No. 533, 93rd Cong., 1st Sess. 10 (1973). As manifest by this Court's decision in *NLRB v. United Insurance Company of America*, 390 U.S. 254 (1968), when Congress in 1947 amended the Labor-Management Relations Act, 1947, ("LMRA") 29 U.S.C. § 141 *et seq.*,

to specifically exclude independent contractors from the definition of employee, at 29 U.S.C. § 152(3), its purpose was to ensure that "general agency principles [be applied] in distinguishing between employees and independent contractors" under LMRA. 390 U.S. at 255-56. Inasmuch as LMRA is the principal federal statute for regulating collective bargaining arrangements,[5] the guidance provided by the aforesaid House Report on ERISA represents a clear intention that common-law principles were intended to be applied in determining employee status under ERISA.

A common-law definition of employee would be consistent with the definition of employee adopted by The Department of Labor ("DOL"), in a recent opinion letter. U.S. Department of Labor Advisory Opinion 91-17A (April 5, 1991). The interpretation adopted by the DOL clearly evidences the *Silk* reasoning, as opposed to the *Hearst Publications* reasoning. The definition set forth in the DOL opinion letter also illustrates how the remedial purposes of ERISA can be achieved within the parameters of the traditional common-law test.

Finally, by reaffirming the preeminence of the common-law test, and rejecting the approach taken by the Fourth

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[5] *See*, 29 U.S.C. § 141, *See, e.g. NLRB v. American National Insurance Co.*, 343 U.S. 395, 401-402 (1952); *NLRB v. Pennsylvania Greyhound Lines, Inc.* 3033 U.S. 261, 266-68 (1938). Furthermore, according to a treatise on the subject of collection bargaining:

> The passage of the Labor Management Relations Act of 1947 confirmed the policy first endorsed in the Wagner Act of 1935 and made unmistakable the public's continued commitment to collective bargaining and the protetcion of workers' rights to organize "for the purpose of negotiating the terms and conditions of their employment." Further, *through the act, the federal government assumed almost full responsibility for regulating* unions' activities and *collective bargaining* except where these related to purely local affairs.

N. Chamberlain & J. Kuhn, *Collective Bargaining* 46 (2d Ed 1965) (emphasis added).

Circuit in devising its own definition of ERISA's protected class, this Court would aid in mitigating the confusion that would otherwise be worsened for all industries with respect to the determination of a worker's status for purposes of ERISA. It is submitted that unless Congress expressly manifests an intent that a term rich with historical definition, such as the term employee, is to be defined in a novel way, courts should be discouraged from abandoning the term's historical definition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reverse the decision of the Fourth Circuit Court of Appeals, insofar as it defines the term employee for purposes of ERISA under the novel three-part test, and in its place adopt the common-law test.

Respectfully submitted,

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